Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1991

CALIFORNIA-HAWAIIAN FUND, INC., TRITON CONTINENTAL PROPERTIES JOINT VENTURE, HUGO VON PLATEN-LUDER, MICHAEL B. MONTGOMERY, RONALD D. McCOMMON, and SHIRLEY VON PLATEN-LUDER,

Petitioners,

vs.

HONOLULU FEDERAL SAVINGS AND LOAN ASSOCIATION, TRITON CONTINENTAL PROPERTIES CORPORATION, ALVIN K.H. CHEE, JAMES ADRIAN ADAMS, CHEE-HIRONAKA, SAM S. HIRONAKA, FEDERAL DEPOSIT INSURANCE CORPORATION, OFFICE OF THRIFT SUPERVISION, and RESOLUTION TRUST CORPORATION,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Is it a violation of Article III, Section 1, of the United States Constitution, for Congress to attempt to restrict the judicial power of the federal courts by prohibiting under 28 U.S.C. § 1447(d) appellate review of District Court remand decisions?

2. Is it a violation of the Due Process Clause of the Fifth Amendment to the United States Constitution and Equal Protection of the Laws for Congress to grant federal agencies unlimited authority to appeal adverse District Court remand decisions while denying that appellate right to private citizens?

3. Does a Court of Appeals have jurisdiction under the Due Process Clause of the Fifth Amendment to the United States Constitution to review a District Court remand decision which is challenged as a violation of Due Process of Law, even though it may be otherwise unreviewable under 28 U.S.C. § 1447(d)?

4. Does a Court of Appeals have jurisdiction notwithstanding 28 U.S.C. § 1447(d) to review a District Court remand decision which is based in part on that District Court's erroneous interpretation of federal law with respect to *non*jurisdictional issues?

5. Does a Court of Appeals have jurisdiction notwithstanding 28 U.S.C. § 1447(d) to review a District Court remand decision which is based in part on that District Court's erroneous interpretation of federal law with respect to jurisdictional issues?

QUESTIONS PRESENTED – Continued

6. Is a District Court remand decision which returns some parties exclusively to State court, while retaining the claims of other parties, reviewable in the Court of Appeals, on appeal by the remanded parties, under the collateral order doctrine, even though the case continues in part in District Court, assuming that that remand decision is otherwise appealable, notwithstanding 28 U.S.C. § 1447(d), or by authority of the United States Constitution itself?

IDENTIFICATION OF PARTIES

The parties to the proceedings below are listed in the front caption of this Petition.

Petitioner California-Hawaiian Fund, Inc., has no parent or subsidiary companies.

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On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

DECISIONS BELOW

This Petition seeks review of the dismissal of two related appeals filed in the Court of Appeals for the Ninth Circuit, Docket Numbers 91-16409 and 91-16524 (dismissed by joint order).

The remand orders there appealed were rendered in Civil No. 91-00050 DAE in the District Court for the District of Hawaii.

None of these decisions to Petitioners' knowledge was published.

These decisions are set forth in Appendices 1 through 5 of this Petition in their entirety.

I

JURISDICTIONAL STATEMENT

Two separate Notices of Appeal were filed in the same District Court case below, known as Civil No. 90-00050 DAE (Hawaii), following *two* separate remand orders. The first Notice of Appeal was filed on August 1, 1991, by Petitioner Shirley Von Platen-Luder; the second Notice of Appeal was filed on September 9, 1991, by Petitioners California-Hawaiian Fund, Inc., Hugo and Shirley Von Platen-Luder, Michael B. Montgomery, Ronald D. McCommon, and Triton Continental Properties Joint Venture.

The two appeals were assigned separate docket numbers, 91-16409 and 91-16524 respectively, and, although not formally consolidated, were considered and disposed of jointly by the Court of Appeals below, which dismissed both appeals for want of appellate jurisdiction by single order filed on December 4, 1991 (Appendix 1, page A-2).

Petitioners below sought a rehearing in both appeals, which was denied by order filed on January 21, 1992 (Appendix 2, page A-3), and a Judgment was entered dismissing both appeals on February 20, 1992 (Appendix 3, page A-5).

Petitioners in both appeals hereby submit this Petition to this Court, jointly, pursuant to Supreme Court Rule 12.2, as the questions presented are closely related if not identical and the writ of certiorari sought is to the same court in the same action, and in accordance with the statutory provisions of 28 U.S.C. § 1254(1).

II

STATEMENT OF THE CASE

A Hawaii thrift sued in state court to recover contract extension fees allegedly owed with respect to its sale of real property to a Hawaii developer in mid-1986; the sale was never consummated. The Hawaii developer and its principal guarantors countersued for breach of contract and for fraudulent misrepresentations.

While the state court action was still in its pleading stages, various other parties were brought in, including three federal agencies: the Federal Deposit Insurance Corporation (FDIC), the Resolution Trust Corporation (RTC), and the Office of Thrift Supervision (OTS), sued as fourth-party defendants. The theory of the fourth-party suit was that the agencies had interfered with the intended sale in order to aid former agency and Cabinet-level officials to take over through stock conversion a profitable mutual savings and loan association by encouraging and ignoring phony insolvency reports.[1]

First Remand. Shirley Von Platen-Luder, a third-party defendant, filed a removal petition in District Court in Hawaii on January 23, 1991, citing 28 U.S.C. § 1441(b) as

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[1] Only by writing down assets could the supervisory takeover be accomplished without prior public notice, and in order to keep REO assets low the sale to the Petitioner Triton Continental Properties Joint Venture had to be scuttled to ensure the barest minimum insolvency numbers that permitted such involuntary conversion.

authority, in that federal agencies were parties.[2] The federal agencies filed motion papers supporting the removal Petition as valid under federal law.[3] But the District Court disagreed, claiming, *inter alia,* that the Petition could only be judged based upon the statutory authority there cited, even though two other statutory authorities were relied upon by the federal agencies in support of the Petition,[4] and the District Court remanded the *entire* action back to state court on July 2, 1991, noting at the hearing that it could do as it pleased without appellate review.[5]

Second Remand. After the *entire* case was returned to state court, presumably because it was not removable, the FDIC then filed its own formal removal Petition, asking that the entire case be removed to District Court.[6] When the Plaintiff in state court objected privately to the entire case going back to federal court, the federal agencies, who had filed using the same case number as before in District Court, then asked the same District Court Judge

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[2] Appendix, page A-75.

[3] Appendix 9, page A-79; the federal agencies joined, explaining that "the case was already in Federal Court by the time counsel for the FDIC and RTC became aware of it. Redundant removals would have been pointless, if not futile. Additional notice of removal could not increase the "degree of removal" . . . Thus, the worst which can be said of the January 23, 1991 removal is that it cited the wrong statutory authority for the removal." Appendix 10, page A-95.

[4] 28 U.S.C. § 1442(a)(1) (Appendix 9), 12 U.S.C. § 1819(b)(2) (Appendix 10). Petitioners similarly cited these provisions in motion papers.

[5] Appendix 6, pages A-40 & 41.

[6] Appendix 11, page A-97.

to hold a "status conference", without a noticed hearing, or any attempt made to explain even the purpose of the status conference, and at that status conference requested that only the fourth-party complaint be removed.[7]

The District Court Judge agreed, and so ordered, over the objection of the Petitioners here. The federal agencies could remove at will, but ordinary parties could not, in the same identical action. The District Court then issued its own Writ to the state court, which was by this time understandably confused, ordering that only the fourth-party complaint of Hugo Von Platen-Luder be removed to federal court, even though that is not what the removal petition actually said.[8]

Sanctions. The District Court did not *merely* remand under 28 U.S.C. § 1447(c); it awarded *monetary* sanctions against Petitioner Shirley Von Platen-Luder, tentatively,[9] in the amount of $32,346.62, for "improvident removal", even though for the FDIC a red carpet was rolled out to the steps of the Federal Court House in the same identical action and upon the same set of facts. It was only upon

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[7] Appendix 7, page A-48.

[8] Appendix 5, at page A-25. Compare with July 29, 1991, Petition for Removal, filed by the FDIC, Appendix 11, at page A-97 ("Petitioner prays that the above-entitled action now pending . . . be removed to this Court." – A-100 & 101).

[9] The determination of the amount of the sanctions was delegated to a Magistrate, who reduced the request of the Plaintiff from $33,251.62, made by affidavit, to $32,346.62, on February 3, 1992; that determination was appealed back to the District Court by Petitioner Shirley Von Platen-Luder on February 18, 1992, and has yet to be acted upon by the District Court.

his allowing the FDIC to remove all or any part of the state court action that it wanted to that the District Court Judge finally, at the August 6, 1991, "status conference", explained that he simply thought that the main case was better off being tried in state court, presumably notwithstanding the removal statutes.[10]

First Appeal. On August 1, 1991, Third-Party Defendant Shirley Von Platen-Luder appealed to the Court of Appeals, seeking to challenge the District Court's remand order (the first, at that time), based upon the following four major substantive federal law issues:

1. as a matter of federal law, citations to removal authority in removal petitions are not determinative of District Court removal jurisdiction; *Rones v. Katalla,* 182 Fed. 946 (Wash. 1910), *affirmed,* 186 Fed. 30 (9th Cir.); *Home Savings and Loan Association v. Issaac & Association,* 496 F. Supp. 831 (N.D. Ill. 1980); *North Rockland Underground Corp. v. Blitman Construction Corp.,* D.C., S.D.N.Y., No. 82 Civ. 4367 CBM, reported in LEXIS, May 3, 1983;

2. as a matter of federal law, third-party defendants are "defendants" for purposes of the removal statutes; there is a conflict in the Circuits on this issue, which is an "open

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[10] See Appendix 7, pages A-48, 61-62 ("we are not the place where people should normally be trying their state law causes of action" . . . "I see no purpose served in bringing the entire state court case back into Federal Court" . . . "I see no legitimate reason why this Court should divest the State court of jurisdiction over a matter which is properly before the State court").

question" in the Ninth Circuit, *O'Halloran v. University of Washington*, 856 F.2d 1375 (9th Cir. 1988); and, with respect to "fourth-party defendants", Hawaii state law treats them identically as ordinary defendants, Section 663-17(a) of the Hawaii Revised Statutes, *Morneau v. Stark Enterprises*, 56 Haw. 420, 425 (1975), *Tamashiro v. De Gama*, 51 Haw. 74, 64 (1969);

3. as a matter of federal law, removal statutes that empower federal agencies to remove state cases also grant that authority to private parties in the case as well; *FDIC v. Otero*, 598 F.2d 627, 629 (1st Cir. 1979); to decide otherwise would grant special privileges to federal agencies that would deny ordinary parties equal protection of the laws, *cf. Hampton v. Mow Sun Wong*, 426 U.S. 88 (1976), by denying equal access to our courts in the same case;

4. as a matter of federal law, abstention decisions are based upon the exercise of discretion and cannot serve as the basis for Section 1447(c) remands and sanction awards; *Corcoran v. Andra Insurance Co.*, 842 F.2d 31 (2d Cir. 1988), *Ryan v. State Board of Elections*, 661 F.2d 31 (7th Cir. 1981); this is particularly true in the case of remands, which cannot be intended merely to avoid burdensome litigation, *Thermtron Products v. Hermansdorfer*, 423 U.S. 336 (1976).

Second Appeal. At the identical time that the first appeal was being filed, the FDIC filed its own Petition for Removal of the State case to District Court, on July 29, 1991, causing the first Appellant, joined by five other

parties, to file a *second* Notice of Appeal, after the *second* remand, on September 9, 1991, and in that second appeal to add to the first appeal by seeking to challenge the second remand order for the following three additional reasons:

5. as a matter of federal law, the FDIC as removal petitioner, by filing its petition in the same District Court case, after the first remand, violated federal practice and the District of Hawaii Local Rules 205-1 and 206-1, by handpicking the same judge that had decided the first remand motion without resort to assignment by the Court or motion practice as required; the evil here was that the assignment was not made by the Court but selected by the FDIC after the prior case had terminated upon remand; Cf. *Civil Aeronautics Board v. Carefree Travel*, 513 F.2d 375 (2d Cir. 1975); no related case was then pending;

6. as a matter of federal law, hearings are always required for Section 1447(c) remands; research has disclosed no other remand having occurred in federal judicial history without a noticed hearing, as distinguished from *evidentiary* proceedings, frequently but not always allowed in remand situations; *Jackson v. City of Vicksburg*, 361 F.2d 473 (5th Cir. 1966);

7. as a matter of federal law, Courts of Appeals have consistently held that federal agencies cannot remove mere *parts* of state cases unless the removed part is separate and independent; *FSLIC v. Quinn*, 419 F.2d 1014 (7th Cir. 1969); Volume 1A, Moore's *Federal Practice*, ¶ 0.157[4.-11] (2d Ed. 1987); yet the

> District Court had earlier on the same facts decided that the federal-agency related allegations were not separate or independent – the "law of this case" already, *Milgard Tempering v. Selas Corp. of America*, 902 F.2d 703, 715 (9th Cir. 1990); at the August 6, 1991, "status conference", even the District Court and the FDIC admitted that they were unaware of the law on *partial* removal (see Appendix 7, A-54-56).

Jurisdictional Dismissals. The Court of Appeals dismissed both appeals, claiming to lack appellate jurisdiction.[11] In a brief, one page opinion, the reviewing panel for the Ninth Circuit held that it had no jurisdiction to hear the *first* appeal because of 28 U.S.C. § 1447(d), and it dismissed the *second* appeal for want of a final judgment under 28 U.S.C. § 1291. In so doing, the Court of Appeals below not only ignored its own settled precedent but violated Petitioners' due process rights under the Fifth Amendment to the Constitution of the United States of America, for the reasons which follow.

III

LEGAL ARGUMENT

For purposes of Supreme Court review of the dismissals below, this Court must *assume* that the facts as

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[11] Appendix 1, A-1. No citations to substantive authorities were provided, nor was any reasoning offered. The Court did cite *Jensen Elec. v. Moore, Caldwell, Rowland & Dodd*, 873 F.2d 1327 (9th Cir. 1989), for the view that the sanctions themselves were not yet appealable until finalized as to amount, which has no relevance here, except to suggest another appellate ordeal that awaits these Petitioners unless this Court decides to review the dismissals below, *id.*, at A-2.

alleged by the Petitioners are *true*, for the Court of Appeals decided that it had no appellate jurisdiction in both appeals – even assuming that the District Court was *wrong* in every one of its conclusions.

Petitioners urge this Court to grant review, for not only are the remand orders below a substantial violation of Petitioners' statutory and constitutional rights which can only be remedied in this forum, but also involved in these two appeals are significant issues of federal law of increasing importance throughout the federal judicial system which should be finally settled by this Court.

And this would be the perfect case to do so.

Otherwise, there will remain conflicts in the Circuits and removal and remand practices that are openly (and not so openly) contrary to this Court's own decisions.

Point 1

THE MOTIONS PANEL OF THE COURT OF APPEALS BELOW VIOLATED PETITIONERS' FEDERAL APPELLATE RIGHTS, SECTION 1447(d) NOTWITHSTANDING, BY DISMISSING THE FIRST APPEAL AND BY REFUSING TO REVIEW THE FIRST REMAND, SINCE THAT DISTRICT COURT REMAND INVOLVED RULINGS ON FEDERAL LAW.

While it is headnote law that remand decisions pursuant to 28 U.S.C. § 1447(d) are not reviewable, in recent years our courts of appeals have begun nevertheless to permit review where such remand orders involve questions of *federal* law, for the federal appellate system would otherwise by powerless to enforce statutory and constitutional authority in removal and remand situations.

Paradoxically, although the conflicts are usually among the Circuits, here the inconsistencies are also within the Ninth Circuit Court of Appeals itself, for the reviewability of remand orders which involve federal issues of statutory interpretation and procedural rules have already been approved in that Circuit in two landmark decisions there: *Clorox Co. v. U.S. District Court*, 779 F.2d 517 (9th Cir. 1985), and *Pelleport Investors v. Budco Quality Theatres*, 741 F.2d 273 (9th Cir. 1984). See also, *Corcoran v. Andra Insurance Co.*, 842 F.2d 31 (2d Cir. 1988), and *Ryan v. State Board of Elections*, 661 F.2d 31 (7th Cir. 1981).

Indeed this Court itself indirectly was faced with the same reviewability issue in *Metropolitan Life Insurance Company v. Taylor*, 481 U.S. 58 (1987), when, called upon to review a Court of Appeals' decision which reversed a refusal by a District Court to remand a state court case based on the presence of federal issues, this Court reversed the Court of Appeals for the Sixth Circuit, which it could not have done were we to read Section 1447(d) literally ("an order remanding a case to the State Court from which it was removed is not reviewable on appeal or otherwise"), for this Court in *Taylor* reversed the Court of Appeals' remand ordering a remand to State court.

More evidence that there is a need for this Court to protect the removal jurisdiction of the federal courts, notwithstanding Section 1447(d), was evident in this Court's earlier decision in *Thermtron Products v. Hermansdorsfer*, 423 U.S. 336 (1976), when this Court held that a District Court could not merely remand a case back to State court to escape extra caseloads, in the Sixth Circuit.

Again, the literal language of Section 1447(d) was ignored by this Court:

> Section 1447(d) is not dispositive of the reviewability of remand orders in and of itself. . . . [O]nly remand orders issued under § 1447(c) and invoking the grounds specified therein – that removal was improvident and without jurisdiction – are immune from review under § 1447(d). . . . There is no doubt that in order to prevent delay in the trial of remanded cases by protracted litigation of jurisdictional issues, United States v. Rice, 327 U.S., at 751, Congress immunized from all forms of appellate review any remand order issued on the grounds specified in § 1447(c), whether or not that order might be deemed erroneous by an appellate court. But we are not convinced that Congress ever intended to extend carte blanche authority to the district courts to revise the federal statutes governing removal by remanding cases on grounds that seem justified to them but which are not recognized by the controlling statute. That justice may move more slowly in some federal courts than in their state counterparts is not one of the considerations that Congress has permitted the district courts to recognize in passing on remand issues. *Id.*, at 345, 346, 357.

Similarly, the *Taylor, Clorox,* and *Pelleport* decisions added to the test of nonreviewability the absence of erroneous federal law rulings, also grounds not specified in Section 1447(c), for, as Petitioners argue, *supra,* pages 5-6, four separate mistakes relating to federal law were made by the District Court below, which necessitated the first appeal, the absence of which would have made the first

removal jurisdictionally correct, as in *Taylor*, *Thermtron*, *Clorox*, and *Pelleport*.

Indeed, this Court's *Thermtron* decision will prove meaningless in practice unless District Court Judges perceive that there is some modicum of reviewability, even if the magic words "improvident and without jurisdiction" are incantated in future opinions by them.

The District Court below felt no such restraints:

> THE COURT: Well, we don't have a lot of law on removal, because, under normal circumstances, the Court's decision to remand is non-appealable. . . .
>
> MS. AKIBA: Correct, Your Honor.
>
> THE COURT: Now, I don't know whether this FDIC statute – I haven't looked at it carefully enough – is an exception to that. Is there an exception to that?
>
> MS. AKIBA: No, Your Honor. The 1442 removal provisions allow the agency or a representative of the agency to remove, Your Honor, under the statute –
>
> THE COURT: Well, what if I remand? Does the agency have the right to appeal?
>
> MS. AKIBA: No, there is no right to appeal a decision to remand – under Section 1442.
>
> THE COURT: Even for the agency?
>
> MS. AKIBA: Even for the agency.
>
> THE COURT: Under its own statutes?
>
> MS. AKIBA: Under its own statute, Your Honor.

> THE COURT: There is just not very much law in this area, because once – that's one of the few instances in the law where, outside of a judgment of acquittal in a criminal case, district judges can make a decision which is non-appealable. Appendix 6, A-40 & 41.

The District Court Judge proceeded to make those four significant mistakes with respect to federal law, yet concluded his first remand order with the phrase "improvidently removed" – which words, if effective to bar even *this* Court's review of such errors, surely must raise serious questions concerning whether the removal and remand jurisdiction of the federal courts is subverting accountability and the equal enforcement of federal laws.

Democratic societies, moreover, rarely brag – for good reason – about such a *government of men* and not laws, however limited it may be. The party who feels the sting perhaps is unable to admire the rest of the system at that juncture of lay experience.

In complete fairness, it may surely be asked whether as to remand decisions each of our District Court Judges is not a "Supreme Court" in and to himself or herself in this respect. The experience of these Petitioners certainly does not runneth to the contrary.

Moreover, one might ask: does even this Court ever have the opportunity or authority to hand out a $33,000.00 punitive sanction award against parties who, before the fact, disagree with its interpretations of federal law?

And, practitioners, as here, are meanwhile left to explain to their clients why they were denied access to the federal courts with *their* claims while federal agencies, again as here, were ushered back into federal court in the same case.

Point 2

THE MOTIONS PANEL OF THE COURT OF APPEALS BELOW VIOLATED PETITIONERS' FEDERAL APPELLATE RIGHTS, SECTION 1291 NOTWITHSTANDING, BY DISMISSING THE SECOND APPEAL AND BY REFUSING TO REVIEW THE SECOND REMAND, SINCE THE SECOND REMAND WAS A FINAL ORDER UNDER THE COLLATERAL ORDER DOCTRINE.

The second remand, similarly, decided federal law issues, and should be reviewable by *any* Court of Appeals, for the same reasons set forth in Point 1 above; moreover, the Court of Appeals erred in concluding that it had no jurisdiction under 28 U.S.C. § 1291 to review the second remand order even if reviewable otherwise.

First, as a matter of common *logic*, the second remand order was a *final* adjudication. Thirteen parties with dozens of pleaded counts between them were *terminally* excluded from federal court as a result of the second remand order, to have their respective rights determined outside of any federal jurisdiction, *permanently*. The Petitioners in the second appeal, for instance, are no longer even parties to that case, *ab initio*, as a result of the second remand order itself, styled as a "writ of certiorari" to the State court.

The law often, thankfully, does follow logic.

Certain orders entered during an action which determine important rights of various parties, but which are not related to the main cause of action before the Court, are indeed appealable in all Circuits as of right, under the *collateral order doctrine.*

In order to satisfy its requirements, an order must (1) determine claims of right separate from and collateral to the rights asserted in the action itself, as opposed to being a step in the way in the path to a disposition on the merits and must merge with the final judgment; (2) determine a claim of right and be final as to that claim of right and not tentative; (3) immediately affect the rights of the parties and where appellate review might be deferred until the case is terminated in the District Court the rights of those parties will be forever lost, irreparably, with respect to the collateral relief sought; and (4) must present a serious and unsettled question which will settle the question on appeal once and for all for the parties and perhaps in appropriate cases for other litigants in similar circumstances.

In such cases, there is no discretion to permit an appeal; the appeal under the collateral order doctrine is *of right.*

All four of those conditions are present in the second appeal. This is in fact a textbook case of an appealable order under that doctrine. See, e.g., *United States v. Hollywood Motor Car Co.*, 458 U.S. 263 (1982); *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949); *Rodgers v. United States Steel Corporation*, 508 F.2d 152 (3rd Cir. 1975), *cert. denied*, 423 U.S. 832; *International Business Machines Corp.*

v. United States, 480 F.2d 293 (2d Cir. 1973), *cert. denied*, 416 U.S. 979.

Appeals under the collateral order doctrine, moreover, do not require that the order appealed from be in final judgment form, *Stevens v. Security Pacific National Bank*, 538 F.2d 1387 (9th Cir. 1976), and a Rule 54(b) certification is similarly not needed, *Swanson v. American Consumer Industries*, 517 F.2d 555 (7th Cir. 1975); in the case of our second remand order, the District court remanded so quickly, even without a noticed hearing, that there was not even time to request a Rule 54(b) certification before that part of the case was back in State Court. See also, *Lauro Lines v. Chasser*, 109 S. Ct. 1976 (1989); *Van Cauwenberghe v. Biard*, 108 S. Ct. 1945 (1988); *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 108 S.Ct. 1133 (1988); *Mitchell v. Forsyth*, 105 S. Ct. 2806 (1985); *Nixon v. Fitzgerald*, 457 U.S. 731 (1982); the Ninth Circuit is no stranger to the collateral order doctrine: *Luben Industries v. United States*, 707 F.2d 1037 (9th Cir. 1983); *Gough v. Perkowski*, 694 F.2d 1140 (9th Cir. 1982); *United States v. Yellow Freight System*, 637 F.2d 1248 (9th Cir. 1980), *cert. denied*, 454 U.S. 815.

Section 1291 no longer a legitimate bar to the second appeal, the issue as to the reviewability of *both* remand orders *as remand orders* is the threshold question for all Petitioners' appellate claims.

Point 3

THE MOTIONS PANEL OF THE COURT OF APPEALS BELOW VIOLATED PETITIONERS' FEDERAL CONSTITUTIONAL DUE PROCESS RIGHTS BY DISMISSING BOTH APPEALS AND BY REFUSING TO REVIEW BOTH REMANDS, SINCE IF FEDERAL AGENCIES ARE ALLOWED TO APPEAL SUCH REMAND ORDERS, PRIVATE PARTIES SUCH AS THESE PETITIONERS ARE ENTITLED TO SUCH APPELLATE EQUAL PROTECTION RIGHTS, AND ACCESS TO THE FEDERAL APPELLATE PROCESS TO VINDICATE SUCH FEDERAL CONSTITUTIONAL RIGHTS IS NOT DEPENDENT UPON STATUTORY AUTHORITY, BUT THE CONSTITUTION OF THE UNITED STATES ITSELF.

Congress has bestowed upon federal agencies special access to our District Courts; not only may federal agencies remove State court cases freely, but if subsequently subjected to remand orders they have a statutory right to appeal. See, e.g., *Hellon & Associates v. Phoenix Resort Corporation*, ___ F.2d ___, 1992 U.S. App. LEXIS 3441 (9th Cir., No. 90-16846, March 5, 1992) (recognizing right of Resolution Trust Corporation to appeal adverse remand order pursuant to 12 U.S.C. § 1441a(1)(3)).

At least one Court of Appeals has held that private parties have the same removal rights as do federal agencies where federal agencies are authorized by Congress to remove State court actions; *FDIC v. Otero*, 598 F.2d 627, 629 (1st Cir. 1979) (interpreting 12 U.S.C. 1819(b)(2) to allow removal by *any party* when the FDIC is also a party to a State court action). It is a question of fairness.

Equal protection of the laws with respect to appellate rights is a cornerstone of American Democracy. It is difficult to imagine the passage of any federal statute that would give special parties exclusive access to federal appellate processes denied to other citizens. Yet, that is what the Court of Appeals below has inadvertently condoned by dismissing both appeals for want of appellate jurisdiction under 28 U.S.C. § 1447(d).

First, such important equal protection rights are well established through an impressive array of this Court's decisions for the past forty years; see, e.g., *Lindsey v. Normet*, 405 U.S. 56 (1972); *Griffin v. Illinois*, 351 U.S. 12 (1956); *Smith v. Bennett*, 365 U.S. 708 (1961); *Lane v. Brown*, 372 U.S. 477 (1963); *Gardner v. California*, 393 U.S. 367 (1969); *Coppedge v. United States*, 369 U.S. 438 (1962); *Ellis v. United States*, 365 U.S. 674 (1985); *Hampton v. Mow Sun Wong*, 426 U.S. 88 (1976). Although the issue of special appellate access has not yet directly been addressed in the context of these facts, it is unthinkable under this weight of authority that Congress constitutionally could discriminate as to who is and who is not allowed to appeal in federal court from *identical* adverse rulings.

Second, there is an even more paramount constitutional *bar* to any restriction on citizens to appeal denials of constitutional rights – the United States Constitution itself. These Petitioners need no enabling statute to seek equal protection relief in the federal appellate process. That very issue was recently confronted by this same Court of Appeals, which, paradoxically, even in the context of sovereign immunity, held that the Constitution itself was the only authority needed to appeal denials of due process rights; *Meyer v. Fidelity Savings*, 944 F.2d. 562

(1991) (even conformity to Federal Tort Claims Act procedures mandated by Congress need not be followed).

Petitioners sought to raise their due process, equal protection challenge, for equal removal rights, and instead were denied equal access to the federal appellate process – a constitutional Catch-22. While it may be possible to justify, constitutionally, rational classifications based upon specific considerations, that allocate appellate rights, giving appeal powers to federal agencies to question remand decisions and denying such powers to all other private litigants is completely unjustifiable.

Equal protection of the laws as a requirement of the Fourteenth Amendment against State action has been interpreted to be a requirement of due process of law under the Fifth Amendment; see, *e.g., Rostker v. Goldberg,* 453 U.S. 57 (1981); *Fullilove v. Klutznick,* 448 U.S. 448 (1980); *Mathews v. De Castro,* 429 U.S. 181 (1976).

Of even more fundamental concern should be whether Congress in the first place may *constitutionally* restrict the appellate powers of federal courts. Article III, Section 1, of the United States Constitution vests "the judicial power" in this Court and such "inferior courts" as may be established. To preserve the independence of the federal judiciary, this Court has on other occasions held that the public interest required it to act even though otherwise disqualified by an Act of Congress; *United States v. Will,* 449 U.S. 200 (1980).

An independent Article III federal judiciary is a critical element in our constitutional structure, and separation of powers is the first line of defense of rights secured by the Constitution; *Glidden v. Zdanok,* 370 U.S. 530 (1962). To

allow Congress to deny appellate review of remand orders eats away at the very core of Article III *judicial power;* cf. *Northern Pipeline Construction Co. v. Marathon Pipeline Co.,* 458 U.S. 50 (1982). From a practical perspective, it breeds *inconsistencies* within the federal judiciary and denies to this Court its overriding *supervisory* function in the interpretation of federal law, while leaving to District Court Judges *final interpretive authority,* notwithstanding the grant of *judicial power* in Article III to this Supreme Court.

In any event, the burden of these Petitioners here is not to persuade this Court at this time that they are right, but only to establish that they have the right to raise such equal protection challenges in the federal appellate process, as they should have been allowed to do below.

IV

CONCLUSION

A review of this case will permit this Court a very large glimpse into a very dark corner of federal law. Little sustained attention has been given to the constitutional problems generated by what have been nearly invisible remand practices in our District Courts.

Petitioners are of course apprehensively aware of the few cases that as a practical matter this Court can review each Term. This Court should therefore consider that it is not only these litigants and others who desire such review, but most District Court Judges below, who have been placed in a uniquely uncomfortable role by Section 1447(d). Inconsistent rulings – not only *between* Circuits

but *within* Circuits, and even *within* District Courts – are proliferating with respect to remand authority and reviewability.

The Court should read, for instance, the opinion of District Judge Debevoise, in *Patient Care v. Freeman*, 755 F. Supp. 644 (D.C. N.J. 1991), who chronicles some of the major confusion and inconsistencies regarding the scope of issues within the universe of remand decisions, conceding his obvious frustration over the endless "cacophony of opinions" being produced. *Id.*, at 652. Indeed, in comparing the ruling in *Patient Care*, and the conflicts among the Circuits there cited with respect to what is a "separate and independent claim" and whether a "third-party defendant" is a defendant for removal purposes, with the contrary District Court opinion below in this case, it is outrageous that a party might prevail in one Circuit, yet be fined in another as much as $33,000.00, for the identical removal petition.

For such understandable reasons, our Courts of Appeals have been laboring in recent years to widen the scope of reviewability of remand orders (where federal agencies are not parties); see, *e.g.*, *Air-Shields v. Fullam*, 891 F.2d 63 (3d Cir. 1989) ("improvident removal" no longer a bar to review under amended Section 1447(c); yet in our case the District Court Judge used that former standard as the basis for his opinion and remand, and even sanctions, relying incorrectly on Section 1441(c) only – Appendix A-16, 21-22); *In Re Shell Oil Company*, 932 F.2d 1518 (5th Cir. 1991) (remand orders based on Section 1441(b) and not Section 1447(c) are reviewable; yet in our case the District Court Judge never cited Section 1447(c) except in relation to a cost award, basing his remand on

Sections 1441(b) and (c) which the Fifth Circuit considers not the "controlling statute" that makes remands unreviewable).

In our case, we have the additional constitutional dimension present of an exclusive grant by Congress of appellate rights to federal agencies, to compound the Constitutional confusion, and heighten the urgency for this Court's review.

The Court will likely never be presented with such a clear opportunity to again review this area of federal jurisdiction, for this case is especially *unique*. Private parties removed, and were coldly rebuked, with sanctions. Then, in the same State court suit, federal agencies removed to the same District Court before the same District Court Judge and were warmly embraced, while the other parties were again sent back to State court, this time without even the benefit of a noticed hearing. Not even was the District Court case number changed.

Until District Court Judges deem themselves *accountable* in remand situations, a task beyond the ability of any other Court to accomplish than this, Section 1447(d) will be little more than a cauldron of capriciousness and an affront to Due Process of Law.

Respectfully submitted,

GARY VICTOR DUBIN
Counsel for Petitioners

Honolulu, Hawaii
April 20, 1992

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

HONOLULU FEDERAL SAVINGS AND LOAN ASSOCIATION, Plaintiff-Appellee, vs. SHIRLEY VON PLATEN-LUDER, Third-party-defendant-cross-claimant/Appellant, vs. TRITON CONTINENTAL PROPERTIES CORPORATION, et al., Third-party-defendants/ Appellees, and FEDERAL DEPOSIT INSURANCE CORPORATION, et al., Fourth-party-defendants/ Appellees.	)	No. 91-16409 DC# CV-91-00050-DAE Hawaii
HONOLULU FEDERAL SAVINGS AND LOAN ASSOCIATION, Plaintiff, vs.	)	No. 91-16524 DC# CV-91-00050-DAE Hawaii

SHIRLEY VON PLATEN-LUDER, et al.,	)	ORDER
Third-party-Defendants Appellants,	)	(Filed Dec. 4, 1991)
and	)	
FEDERAL DEPOSIT INSURANCE CORPORATION, et al.,	)	
Fourth-party-defendants/ Appellees.	)	

Before: FARRIS, POOLE and NORRIS, Circuit Judges

Appellant's motion in appeal no. 91-16409 for a one-day enlargement of time in which to respond to the motion to dismiss the appeal filed by plaintiff/appellee Honolulu Federal Savings and Loan Association is granted. Appellant's opposition to the motion shall be filed.

The motion to dismiss appeal no. 91-16409 is granted. *See* 28 U.S.C. § 1447(d); *Jensen Elec. v. Moore, Caldwell, Rowland & Dodd*, 873 F.2d 1327 (9th Cir. 1989) (order imposing attorneys' fees without determining specific amount not a final and appealable order). The request for sanctions contained in the motion to dismiss no. 91-16409 is denied.

The motion to dismiss appeal no. 91-16524 is also granted. *See* 28 U.S.C. § 1291. The motion to consolidate the two appeals is denied as moot.

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

HONOLULU FEDERAL SAVINGS AND LOAN ASSOCIATION, Plaintiff-Appellee, vs. SHIRLEY VON PLATEN-LUDER, Third-party-defendant-cross-claimant/Appellant, vs. TRITON CONTINENTAL PROPERTIES CORPORATION, et al., Third-party-defendants/Appellees, and FEDERAL DEPOSIT INSURANCE CORPORATION, et al., Fourth-party-defendants/Appellees.	No. 91-16409 DC# CV-91-00050-DAE Hawaii ORDER (Filed Jan. 21, 1992)
HONOLULU FEDERAL SAVINGS AND LOAN ASSOCIATION, Plaintiff, vs. SHIRLEY VON PLATEN-LUDER, et al.,	No. 91-16524 DC# CV-91-00050-DAE Hawaii

Third-party-Defendants Appellants,	)	ORDER
and	)	
FEDERAL DEPOSIT INSURANCE CORPORATION, et al.,	)	
Fourth-party-defendants/ Appellees.	)	

Before: FARRIS, POOLE and NORRIS, Circuit Judges

The petition for rehearing and suggestion for rehearing en banc are denied in both appeals. The emergency motion for stay and relief requested therein are also denied in both appeals. No further filings will be accepted in these closed appeals.

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JUDGMENT

Filed in the United States District Court, District of Hawaii, February 20, 1992, as a True Copy Attested to, February 18, 1992, by Clerk, United States Court of Appeals, Ninth Circuit

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NO. 91-16409
CT/AG#: CV-91-00050-DAE

HONOLULU FEDERAL SAVINGS AND LOAN ASSOCIATION

Plaintiff – Appellee

v.

SHIRLEY VON PLATEN-LUDER

Third-party-defendant-cross-claimant – Appellant

v.

TRITON CONTINENTAL PROPERTIES CORPORATION, et al.,

Third-party-defendant – Appellee

FEDERAL DEPOSIT INSURANCE CORPORATION, Office of Thrift Supervision, Resolution Trust Corporation, United States Federal Corporations and Agencies, jointly and severally

Fourth-party-defendant – Appellee

NO. 91-16524
CT/AG#: CV-91-00050-DAE

HONOLULU FEDERAL SAVINGS AND LOAN ASSOCIATION

Plaintiff

v.

TRITON CONTINENTAL PROPERTIES CORPORATION; CALIFORNIA-HAWAIIAN FUND, INC.; HUGO and SHIRLEY VON PLATEN-LUDER; MICHAEL B. MONTGOMERY; RONALD MCCOMMON

Defendants – Appellants

FEDERAL DEPOSIT INSURANCE CORPORATION, Office of Thrift Supervision, Resolution Trust Corporation, United States Federal Corporations and Agencies, jointly and severally

Fourth-party-defendant – Appellee

(Filed Feb. 20, 1992)

APPEAL FROM the United States District Court for the U.S. District Court of Hawaii.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the _____ appeals _____in this cause be, and hereby are dismissed.

Filed and entered December 04, 1991

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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

HONOLULU FEDERAL SAVINGS AND LOAN ASSOCIATION, Plaintiff, vs. TRITON CONTINENTAL PROPERTIES JOINT VENTURE, TRITON CONTINENTAL PROPERTIES CORPORATION, MICHAEL B. MONTGOMERY, HUGO VON PLATEN-LUDER, ABRAHAM GROSSMAN, RONALD D. McCOMMON, and CALIFORNIA-HAWAIIAN FUND, INC., Defendants.	CIVIL NO. 91-00050 DAE
CALIFORNIA-HAWAIIAN FUND, INC., a Hawaii corporation, for itself and as assignee, Third-Party Plaintiff, vs. TRITON CONTINENTAL PROPERTIES CORPORATION, a Hawaii corporation,	

Third-Party Defendant,

and

ALVIN K.H. CHEE, JAMES ADRIAN ADAMS, HUGH P. CONSER, CHEE-HIRONAKA, a Hawaii General Partnership, SAM S. HIRONAKA, and JOHN DOES 1-10, JANE DOES 1-10, DOE PARTNERSHIPS 1-10, DOE CORPORATIONS 1-10, DOE FINANCIAL INSTITUTIONS 1-10, DOE ENTITIES 1-10, and DOE GOVERNMENTAL UNITS 1-10,

Additional Third-Party Defendants.

TRITON CONTINENTAL PROPERTIES CORPORATION, ALVIN K. H. CHEE, and JAMES ADRIAN ADAMS,

Cross-Claimants,

vs.

MICHAEL B. MONTGOMERY, HUGO VON PLATEN-LUDER, and RONALD D. McCOMMON,

Cross-Claim Defendants,

and

SHIRLEY VON PLATEN-LUDER and ABRAHAM GROSSMAN,

Additional Cross-Claim Defendants.

HUGO VON PLATEN-LUDER,

Fourth-Party Plaintiff

vs.

FEDERAL DEPOSIT INSURANCE CORPORATION, OFFICE OF THRIFT SUPERVISION, RESOLUTION TRUST CORPORATION, United States Federal Corporations and Agencies, jointly and severally,

Fourth-Party Defendants.

ORDER GRANTING PLAINTIFF'S MOTION TO REMAND AND FOR SANCTIONS AND DENYING FOURTH-PARTY DEFENDANTS' MOTION TO DISMISS FOURTH-PARTY COMPLAINT

(Filed Jul. 2, 1991)

On February 22, 1991, plaintiff Honolulu Federal Savings and Loan Association ("Hon Fed") filed a motion to remand and for sanctions or, in the alternative, for expedited hearing of pending motions pursuant to 28 U.S.C. §§ 1441 and 1447(c) and Federal Rule of Civil Procedure

("Rule") 11.[1] On March 19, 1991, fourth-party defendants Federal Deposit Insurance Corporation, Office of Thrift Supervision, and Resolution Trust Corporation (collectively "fourth-party defendants") filed a motion to dismiss the fourth-party complaint pursuant to Rules 12(b)(1) and 12(b)(6).[2]

Both motions came on for hearing before this court on April 12, 1991, and July 1, 1991. Lorraine H. Akiba, Esq. appeared on behalf of Hon Fed. Gary Victor Dubin, Esq. appeared on behalf of defendant, counterclaimant, third-party plaintiff, and third-party counterclaim defendant California-Hawaiian Fund, Inc. ("Cal. Hawaiian"); defendants, counterclaimants, and thrid-party cross-claim defendants Michael B. Montgomery ("Montgomery") and Ronald D.McCommon ("McCommon"); defendant, counterclaimant, third-party cross-claim defendant, and fourth-party plaintiff Hugo von Platen-Luder ("Hugo VPL"); and third-party cross-claim defendant and removal petitioner Shirley von Platen-Luder ("Shirley VPL"). Adelbert Green, Esq. appeared on behalf of TCPC, Chee, Adams, C-H, and Hironaka. Beverly A. Wee, Esq. and Daniel Ross, Esq. appeared on behalf of fourth-party defendants.

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[1] Third-party defendants and cross-claimants Triton Continental Properties Corporation ("TCPC"), Alvin K.H. Chee ("Chee"), James Adrian Adams ("Adams"), Chee-Hironaka ("C-H"), and Sam S. Hironaka ("Hironaka") have filed a statement of no position with respect to plaintiff's motion.

[2] Hon Fed joins in fourth-party defendants' motion; third-party defendants and cross-claimants TCPC, Chee, Adams, C-H, and Hironaka filed a statement of no position with respect to this motion.

At the April 12 hearing, Mr. Dubin informed the court that McCommon had filed a voluntary petition for bankruptcy under Chapter 7 and that the United States Bankruptcy Court for the Central District of California had issued an automatic stay of all proceedings against McCommon pursuant to 11 U.S.C. § 362(a). This court continued the hearing on Hon Fed's motion to remand and fourth-party defendants' motion to dismiss the fourth-party complaint until July 1, 1991, at which time Mr. Dubin was to provide the court with documentation to support his claim that a stay was in effect.

BACKGROUND

Hon Fed filed the present action against the defendants seeking to collect outstanding extension fees and carrying costs incurred in 1986. The fees were allegedly incurred when the defendants requested repeated extensions of closing dates for the purchase of 17 leasehold lots in the Radford Commercial Center in Halawa, Hawaii. The complaint was filed on October 15, 1986, in the First Circuit Court of the State of Hawaii.

On December 18, 1986, defendants Triton Joint Venture ("TJV"), Cal-Hawaiian, Montgomery, Hugo VPL, Abraham Grossman ("Grossman"), and McCommon filed a counterclaim against Hon Fed. All claims between Hon Fed and the Triton Continental Properties Corporation ("TCPC") were subsequently dismissed, and Hon Fed also settled with Grossman. With respect to the remaining defendants, State Circuit Court Judge Robert G. Klein granted Hon Fed's motion for summary judgment on October 19, 1988. Judgment was entered against these

defendants in the amount of $87,897.27, plus interest, court costs, and attorney's fees.

On November 6, 1989, Cal-Hawaiian filed a third-party complaint against TCPC and additional third-party defendants Alvin K.H. Chee ("Chee"), James Adrian Adams ("Adams"), Hugh Conser ("Conser"), Chee-Hironaka ("C-H"), and Sam S. Hironaka ("Hironaka") alleging breach of contract, fraud and deceit, and seeking collection upon a written promissory note, punitive damages, and contribution.

On January 16, 1991, third-party defendants TCPC, Chee, Adams, C-H, and Hironaka filed a counterclaim against third-party plaintiff Cal-Hawaiian. In addition, third-party defendants TCPC, Chee, and Adams filed a third-party cross-claim against original defendants Montgomery, Hugo VPL, McCommon, Grossman, and new cross-claim defendant Shirley VPL. The third-party cross-claim was the first pleading to set forth *federal* claims[3]. On January 22, 1991, Hugo VPL filed a fourth-party complaint against fourth-party defendants, which are all federal entities.

On January 23, 1991, Shirley VPL filed a notice of removal to this court based on the federal claims raised in the third-party cross-claim against her and also based on the federal status of the fourth-party defendants. At the

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[3] The third-party cross-claim alleges, *inter alia*, securities fraud and unfair and deceptive trade practices in violation of 15 U.S.C. §§ 78j and 45.

time of removal, several motions were pending in state court.[4]

DISCUSSION

A. McCommon's Bankruptcy Stay

Title 11 U.S.C. § 362(a) provides in part:

> Except as provided in subsection (b) of this section,[5] a petition filed under section 301,[6] 302, or 303 of this title . . . operates as a stay, applicable to all entities, of – (1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or arose before the commencement of the case under this title. . . .

Attached as Exhibit "A" to the Notice of Objection on Constitutional and Jurisdictional Grounds Filed by the Trustee in Bankruptcy of the Estate of Defendant Ronald McCommon to Plaintiff's Application for Issuance of Garnishee Summons Before Judgment, filed November 17,

---

[4] Namely, Hon Fed's motion for summary judgment on defendants' counterclaim, Hon Fed's motion for protective order and for sanctions relating to a particular deposition, defendants' motion for reconsideration of the court's order granting plaintiff's motion for partial summary judgment, and Hon Fed's motion to dismiss defendants' counterclaim.

[5] Subsection (b) does not apply to the present case.

[6] McCommon's voluntary petition for bankruptcy would fall under § 301.

1988, is the Notice of Stay issued by the United States Bankruptcy Court for the Central District of California. The Notice is dated August 13, 1987, and provides:

> The effect of this stay is equivalent to an automatic restraining order against creditors from commencing or continuing any lawsuit, or enforcement of any judgment or enforcement of any lien against property without *first* applying to this Court for relief from stay.
>
> Title 11 U.S.C. § 362(c) provides in part:
>
> Except as provided in subsections (d), (e) and (f) of this section[7] – (2) the stay . . . under subsection (a) of this section continues until the earliest of – (a) the time the case is closed; (B) the time the case is dismissed; or (C) *if the case is a case under chapter 7 . . . , the time a discharge is granted or denied.*

Hon Fed states that the Bankruptcy Court discharged all the dischargeable debts of McCommon on August 1, 1990. *See* Plaintiff Honolulu Federal Savings and Loan Association's Supplemental Memorandum in Support of Motion to Remand and for Sanctions at 5. Hon Fed. has submitted a U.S. Bankruptcy Court document confirming McCommon's release from all dischargeable debts. *See id.*, Exhibit "D." Thus, according to 11 U.S.C. § 362(c)(2)(C), it appears from the record that at this time the automatic stay is no longer in effect. No documentation to the

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[7] Subsections (d), (e) and (f) provide that a party in interest may seek relief from the stay.

contrary has been provided to this court.[8] Accordingly, the court will proceed to address the merits of the motions before it.

B. Hon Fed's Motion to Remand

Hon Fed argues that the present case was improperly removed by Shirley VPL because "a third-party cross-claim may not be the basis for removal and a third-party cross-claim defendant is not entitled to remove a case under [28 U.S.C.] § 1441." Memorandum in Support of Plaintiff's Motion for Summary Judgment ("Hon Fed Memorandum") at 2.

Title 28 U.S.C. § 1441(a) provides that:

> [A]ny civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.

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[8] At the hearing on these motions, Mr. Dubin provided to the court a letter addressed to himself from Michael Montgomery, who happens to be one of Mr. Dubin's clients in the present case. In the letter, Montgomery concedes that a notice of discharge was filed but argues that it was of no effect. The letter did not indicate that the bankruptcy stay had actually been re-instated, nor was it an official court document. Without such evidence, this court will assume that the stay was lifted on August 1, 1990.

Title 28 U.S.C. § 1441(b) provides:

> Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.

Finally, 28 U.S.C. § 1441(c), as amended in 1990, provides:

> Whenever a separate and independent claim or cause of action within the jurisdiction conferred by section 1331 of this title[9] is joined with one or more otherwise nonremovable claims or causes of action, the entire case may be removed and the district court may determine all issues therein, or, in its discretion, may remand all matters in which States law predominates.

In the present case, the first *federal* claims to be raised were contained in the third-party counterclaim and cross-claim.[10] In particular, the third-party counterclaim and

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[9] Section 1331 of title 28 provides for federal question jurisdiction.

[10] The fourth-party complaint, which "incorporates by reference" the complaint filed in this court in a class action suit before United States District Judge Alan C. Kay, also contains federal claims. A motion to dismiss was heard in that case on April 1, 1991, and the court dismissed the complaint with sanctions by written order filed April 22, 1991. A motion for reconsideration of Judge Kay's ruling has been filed but not yet decided.

cross-claim allege securities fraud and unfair and deceptive trade practices in violation of 18 U.S.C. §§ 78j and 45. Hon Fed's claims against the defendants, defendants' counterclaim against Hon Fed, and Cal-Hawaiian's third-party complaint all involve *state law claims only*.

The Ninth Circuit has not addressed the question of whether a third-party defendant is a "defendant" within the meaning of the removal statute. *See O'Halloran v. University of Washington*, 856 F.2d 1375, 1381 (9th Cir. 1988). The question of whether a particular party is a defendant for purposes of removal is a matter of federal law. *Minot Builders Supply Ass'n v. Teamsters Local 123*, 703 F.2d 324 (8th Cir. 1983). This court, however, has addressed the issue in another case.

In *Queen Victoria Corp. v. Insurance Specialists of Hawaii, Inc.*, this court held that a third-party defendant was not entitled to remove an action to federal court because the third-party complaint arose out of the same occurrence as that giving rise to the original complaint. 711 F. Supp. 553 (D. Haw. 1989). Therefore, the third-party complaint could not be considered "separate and independent" within the meaning of 28 U.S.C. § 1441(c). *Id.* at 555. The court noted that under Hawaii law, a third-party defendant had to be one " 'who is or may be liable to [the third-party plaintiff] for all or part of the plaintiff's claim against him' " and pointed out that this requirement necessarily resulted in a "certain identity of issues" between a third-party claim and the main suit such that neither could be considered "separate and independent" of the other. *Id.* at 555 (citations omitted).

Similarly, in *Midstate Bank v. Murray*, a third-party defendant sought removal. 592 F. Supp. 798 (D. Mont. 1984). The Montana district court evaluated each of the third-party defendant's claims to determine whether they were "separate and independent" within the meaning of 28 U.S.C. § 1441(c)[11] *Id.* at 800. Strictly construing 28 U.S.C. § 1441(c) against removal,[12] the court concluded that "the principal claim and the third-party claims are not separate and independent within the meaning of 28 U.S.C. § 1441(c)." *Id.*

> Obviously, there exists [sic] common questions of fact and law in the original action and the third-party action. Both actions arise from the same set of operative facts with the principal claim and third-party claim being inextricably intertwined.

Id.

Courts in other circuits have similarly held that a third-party defendant may not remove a case to federal court on the basis of a third-party claim. *See Thomas v. Shelton*, 740 F.2d 478 (7th Cir. 1984) (third-party claim not "separate and independent" from the state claim because if the state claim were dismissed, the third-party claim would be moot); *Elkhart Co-op Equity Exchange v. Day*, 716

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[11] "Third[-][p]arty defendants, like other defendants who have not voluntarily chosen to utilize state court, should be, and are, allowed to remove *separate and independent claims*." *Southland Corp. v. Estridge*, 456 F. Supp. 1296, 1301 (C.D.Cal. 1978) (emphasis added).

[12] As federal courts are required to do pursuant to *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100, 61 S. Ct. 868 (1941).

F. Supp. 1384 (D. Kan. 1989) (third-party or cross-claim defendant is not entitled to remove a case because a cross-claim is not separate and independent from the claims brought by the plaintiff against the defendants); *University of Chicago Hosp. and Medical Center v. Rivers*, 701 F. Supp. 647 (N.D. Ill. 1988) (third-party defendants not "defendants" within meaning of 28 U.S.C. § 1441(a) or (c)); *see also Gruber v. Hubbard Bert Karle Weber, Inc.*, 684 F. Supp. 879 (W.D. Pa. 1988); *Elba Tp., Dodge County, Wis. v. Steffenhagen*, 664 F. Supp. 1238 (E.D. Wis. 1987); *Continental Resources and Mineral Corp. v. Continental Ins. Co.*, 546 F. Supp. 850 (S.D. W.Va. 1982); *cf. Lawyers Title Ins. Corp. v. Pioneer Nat'l Title Ins. Corp.*, 600 F. Supp. 402 (D.S.C. 1984) (cross-claim defendant could not remove case because the cross-claim was not "separate and independent" from the nonremovable claim).

Each of the cases cited above turns on a finding that the third-party claim or cross-claim was not "separate and independent" to the main suit. *See Poisson v. Maintenance Pace Setters, Inc.*, 696 F. Supp. 1141 (E.D. Mich. 1988) (third-party defendant may remove a case only if the third-party claim is separate and independent from the underlying action). In *American Fire & Casualty Co. v. Finn*, 341 U.S. 6, 71 S. Ct. 534 (1951), the United States Supreme Court defined "separate and independent" within the meaning of 28 U.S.C. § 1441(c).

> [W]here there is a single wrong to [the] plaintiff, for which relief is sought, arising from an interlocked series of transactions, there is no separate and independent claim or cause of action under § 1441(c).

Id. at 14, 71 S. Ct. at 540. "Separate and independent" was also defined in *Ehrlich v. Oxford Ins. Co.*, 700 F. Supp. 495 (N.D. Cal. 1988).

> A claim is separate and independent from other claims if it involves an actionable wrong separate from the other claims and if complete relief may be afforded as to it without reference to the other claims and without the presence of the parties to the other claims.

Id. at 497.

In the present case, the court finds that the third-party cross-claim brought by third-party defendants TCPC, Chee, and Adams against removal petitioner Shirley VPL cannot be deemed "separate and independent" from the nonremovable claims, particularly Hon Fed's claim against the defendants. The subject matter of the third-party cross-claim is the Purchase Agreement entered into between Hon Fed and the defendants in the above-entitled action. *See* Third-Party Cross-Claim at 4. Specifically, the cross-claim alleges that the third-party cross-claim defendants obtained extensions of the closing deadline without the prior knowledge or consent of the third-party defendants. Third-Party Cross-Claim at 6. It alleges breach of contract, breach of the covenant of good faith and fair dealing, fraud, deceit and misrepresentation, securities fraud, unfair and deceptive trade practices, civil conspiracy, and prima facie tort, *all relating to the agreement entered into between Hon Fed and the defendants*. As such, the court finds that the third-party cross-claim is not "separate and independent" from Hon Fed's state law claims against the defendants.

Because the third-party cross-claim against Shirley VPL was not "separate and independent" from the non-removable claims in the present suit, removal was improper. Accordingly, the court grants Hon Fed's motion to remand the above-entitled action to state court.

Fourth-party defendants have filed a memorandum in which they argue that removal was proper on the basis of 28 U.S.C. § 1442. That statute provides that a civil action commenced in a state court against any agency of the United States "for any act under color of such office" may be removed to federal court. 28 U.S.C. § 1442 (a)(1). Even if the United States and its agencies are not defendants but rather third-party defendants, they may remove a case pursuant to this statute. *Johnson v. Showers*, 747 F.2d 1228 (8th Cir. 1984); *IMFC Professional Servs. of Florida, Inc. v. Latin American Home Health, Inc.*, 676 F.2d 152 (5th Cir. 1982). In the present case, the federal agencies are fourth-party defendants.

However, the removing party must be a party to the claim upon which removal is based. *Ehrlich*, 700 F. Supp. at 497. In this case, Shirley VPL, not the fourth-party defendants, filed the notice of removal. Because Shirley VPL was not a party to the fourth-party complaint, removal cannot be based on the fourth-party defendants' status as federal entities. In fact, in each of the cases cited by fourth-party defendants, the *federal agencies* were the parties who filed the notice of removal pursuant to § 1442(a)(1). *See, e.g., Ely Valley Mines, Inc. v. Hartford Accident and Indemnity Co.*, 644 F.2d 1310 (9th Cir. 1981); *Ewell v. Petro Processors of Louisiana, Inc.*, 655 F. Supp. 933 (M.D. La. 1987); *Oklahoma Bankers Ass'n v. Home Savings and Loan Ass'n*, 625 F. Supp. 993 (W.D. Okla. 1984);

National Audubon Soc. v. Department of Water & Power, 496 F. Supp. 499 (E.D. Cal. 1980).

Fourth-party defendants also cite *Federal Deposit Ins. Corp. v. Otero* for the proposition that 12 U.S.C. § 1819(b)(2) allows removal *by any party* of actions to which the FDIC is a party. 598 F.2d 627, 630 (1st Cir. 1979). *Otero* is not controlling for two reasons. First, Shirley VPL did not cite 12 U.S.C. § 1819(b)(2) in her removal petition. Second, although the *Otero* court allowed a non-FDIC party to remove on the basis of § 1819, *the removing party and the FDIC were parties to the same complaint.* In the present case, the FDIC and Shirley VPL are *not* parties to the same complaint.

C. Hon Fed's Motion for Sanctions

Hon Fed claims that because removal was improper, it should be allowed to recover the costs of bringing this motion to remand. Title 28 U.S.C. § 1447(c) provides in part:

> An order remanding the case may required payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal.

28 U.S.C. § 1447(c) (Supp. 1990). This statute *does not require a finding of bad faith* if a district court finds that a case was removed improvidently and without jurisdiction. *News-Texan, Inc. v. City of Garland, Tex.*, 814 F.2d 216 (5th Cir. 1987); *see also Schmidt v. National Organization for Women*, 562 F. Supp. 210 (N.D. Fla. 1983). Although not required, a finding that removal was undertaken in bad

faith will support an award of sanctions. *See Cornwall v. Robinson*, 654 F.2d 685 (10th Cir. 1981); *Peltier v. Peltier*, 548 F.2d 1083 (1st Cir. 1977).

If a third-party defendant attempts to remove a third-party complaint which is not separate and independent from the nonremovable claim, the non-removing party is entitled to an award of costs. *Elba Tp.*, 664 F. Supp. at 1241. If a petition for removal is patently deficient under § 1441(c), then an award of costs is appropriate. *Id.* On the other hand, if the question of removal is close and novel, sanctions are not warranted. *Moore v. Bishop*, 520 F. Supp. 1187 (D. S.C. 1981); *Capitol Cake Co. v. Lloyd's Underwriters*, 453 F. Supp. 1156 (D. Md. 1978).

In the present case, Shirley VPL attempted to remove the above-entitled action on the basis of a third-party cross-claim which is inextricably intertwined with the nonremovable state law claims brought by Hon Fed and others. Under 28 U.S.C. § 1441(c), a claim may be removed only if it is "separate and independent." The question of removability in this case was not close or novel.[13] Because the removal petition was patently deficient under § 1441(c), the court finds that an award of costs and attorneys' fees to Hon Fed for bringing this

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[13] The court also notes that the notice of removal was apparently filed less than one half hour before Hon Fed's motion for summary judgment with respect to defendants' counterclaim was set to be heard before state Judge Robert Klein. Counsel for removal petitioner Shirley VPL also represents several defendants, namely, Cal-Hawaiian, Montgomery, McCommon, and Hugo VPL, each of whom joined in the counterclaim against Hon Fed.

motion to remand is warranted. Accordingly, the court grants Hon Fed's motion for sanctions.

D. Fourth-Party Defendants' Motion to Dismiss Fourth-Party Complaint

Because this court has determined that removal was improper, it does not have jurisdiction to address the merits of any of the claims involved in the instant case. Accordingly, the court denies fourth-party defendants' motion to dismiss the fourth-party complaint. Fourth-party defendants may, of course, bring a similar motion in state court.

CONCLUSION

Based on the foregoing, the court hereby grants Hon Fed's motion to remand and for sanctions and denies without prejudice fourth-party defendants' motion to dismiss the fourth-party complaint.

IT IS SO ORDERED

DATED: Honolulu, Hawaii, Jul - 2 1991.

/s/ David Alan Ezra
DAVID ALAN EZRA
UNITED STATES DISTRICT JUDGE

Honolulu Federal Savings and Loan Ass'n v. Triton Continental properties Joint Venture, et al.; Civil No. 91-00050; ORDER GRANTING PLAINTIFF'S MOTION TO REMAND AND FOR SANCTIONS AND DENYING FOURTH-PARTY DEFENDANT'S MOTION TO DISMISS FOURTH-PARTY COMPLAINT

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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

HONOLULU FEDERAL SAVINGS AND LOAN ASSOCIATION, Plaintiff, vs. TRITON CONTINENTAL PROPERTIES JOINT VENTURE, TRITON CONTINENTAL PROPERTIES CORPORATION, MICHAEL B. MONTGOMERY, HUGO VON PLATEN-LUDER, ABRAHAM GROSSMAN, RONALD D. McCOMMON, and CALIFORNIA-HAWAIIAN FUND, INC., Defendants.	CIVIL NO. 91-00050 DAE (U.S.D.C.-Hawaii) CIVIL NO. 86-3865 (First Circuit Court) ORDER DIRECTING CLERK TO ISSUE WRIT OF CERTIORARI (Filed Aug. 9, 1991)

CALIFORNIA-HAWAIIAN FUND, INC., a Hawaii corporation, for itself and as assignee,

Third-Party Plaintiff,

vs.

TRITON CONTINENTAL PROPERTIES CORPORATION, a Hawaii corporation,

Third-Party Defendant,

and

ALVIN K.H. CHEE, JAMES ADRIAN ADAMS, HUGH P. CONSER, CHEE-HIRONAKA, a Hawaii General partnership, SAM S. HIRONAKA, and JOHN DOES 1-10, JANE DOES 1-10, DOE PARTNERSHIPS 1-10, DOE CORPORATIONS 1-10, DOE FINANCIAL INSTITUTIONS 1-10, DOE ENTITIES 1-10, and DOE GOVERNMENTAL UNITS 1-10,

Additional Third-Party Defendants.

TRITON CONTINENTAL PROPERTIES CORPORATION, ALVIN K.H. CHEE and JAMES ADRIAN ADAMS,

Cross-Claimants,

vs.

MICHAEL B. MONTGOMERY, HUGO VON PLATEN-LUDER and RONALD D. McCOMMON,

Cross-Claim Defendants,

and

SHIRLEY VON PLATEN-LUDER and ABRAHAM GROSSMAN,

Additional Cross-Claim Defendants.

HUGO VON PLATEN-LUDER,

Fourth-Party Plaintiff,

vs.

FEDERAL DEPOSIT INSURANCE CORPORATION, OFFICE OF THRIFT SUPERVISION, RESOLUTION TRUST CORPORATION, United States Federal Corporations and Agencies, jointly and severally,

Fourth-Party Defendants.

ORDER DIRECTING CLERK TO ISSUE WRIT OF CERTIORARI

The application of fourth-party defendant, Federal Deposit Insurance Corporation for an order directing the

Clerk of this Court to issue a Writ of Certiorari to the Clerk of the Circuit Court of the First Circuit for the State of Hawaii, requiring the Clerk and Court to transmit to this Clerk and Court the records of the First Circuit Court relating only to the fourth-party complaint entitled *Hugo Von Platen-Luder v. Federal Deposit Insurance Corporation, et al.*, and all records of the First Circuit Court relating to this fourth-party complaint, having been filed and this Court having considered the application and all the matters in the premises, and good cause appearing therefor;

IT IS HEREBY ORDERED that the Clerk of this Court issue a Writ of Certiorari directed to the Clerk of the Circuit Court of the First Circuit of the State of Hawaii and to the Judges therefore, commanding the Clerk of the First Circuit Court, to certify and transmit to this Court only those records and proceedings in the fourth-party complaint entitled *Hugo Von Platen-Luder, Fourth-Party Plaintiff v. Federal Deposit Insurance Corporation, Office of Thrift Supervision, Resolution Trust Corporation*, and to include only those pleadings, papers, orders, transcripts, and records relating to said fourth-party action therein. The Clerk of the First Circuit Court, State of Hawaii, is ordered to limit its transfer to only those documents relating to the fourth-party complaint.

IT IS FURTHER ORDERED that the Clerk of this Court issue a Writ of Certiorari directed to the Clerk and the Judges of the Circuit Court of the First Circuit of the State of Hawaii commanding and requiring them to proceed no further in connection with the fourth-party complaint as designated herein above. However, it should be further noted that this order does not affect the Clerk and the Judges of the Circuit Court of the First Circuit of the

State of Hawaii's ability to proceed on all matters other than the fourth-party complaint in the action entitled *Honolulu Federal Savings and Loan Association v. Triton Continental Properties Joint Venture, et al.*

DATED: Aug 08, 1991, at Honolulu, Hawaii.

/s/ DAVID A. EZRA
UNITED STATES
DISTRICT JUDGE

Honolulu Fed. Savings & Loan Assoc. v. Triton,
Civil No. 91-00050 DAE
"Order Directing Clerk to Issue Writ of Certiorari"

6

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

HONOLULU FEDERAL SAVINGS & LOAN ASSOCIATION,	)	CIVIL NO. 91-00050DAE
Plaintiff,	)	
vs.	)	
TRITON CONTINENTAL PROPERTIES JOINT VENTURE, et al.,	)	
Defendants.	)	

TRANSCRIPT OF PROCEEDINGS

The above-entitled matter came on for hearing on Monday, July 1, 1991, at 9:46 a.m., at Honolulu, Hawaii,

BEFORE:

HONORABLE DAVID A. EZRA

United States District Judge

District of Hawaii

REPORTED BY: STEPHEN B. PLATT, CSR, RPR, CM
Official U.S. District Court Reporter
District of Hawaii

APPEARANCES:

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[p. 1] MONDAY, JULY 1, 1991 9:46 A.M.

THE CLERK: Civil 91-50, Honolulu Federal Savings & Loan versus Triton Continental Properties Joint Venture, and others.

This hearing is called to determine whether bankruptcy stay in place.

MR. DUBIN: Good morning, Your Honor.

Gary Dubin, representing the Cal-Hawaiian parties, plaintiffs.

MS. WEE: Good morning, Your Honor.

Beverly Wee, Assistant U.S. Attorney, on behalf of the federal defendants, OTS, FDIC, and RTC; and I am also pleased to introduce at this time Daniel Ross, who is the counsel for the Federal Deposit Insurance Corporation in Washington, and will be presenting the federal defendants' arguments in connection with this hearing.

THE COURT: All right.

MR. ROSS: Good morning.

MS. AKIBA: Good morning, Your Honor.

Lorraine Akiba for Plaintiff Honolulu Federal Savings & Loan Association.

MR. GREEN: Good morning, Your Honor.

Adel Green, on behalf of Third-Party Defendants Triton Continental Properties Corporation, Alvin Chee, [p. 2] James Adams, Chee-Hironaka, and Sam Hironaka.

THE COURT: Very good.

All right. It's your motion, Ms. Akiba.

MS. AKIBA: Thank you, Your Honor.

Since there are so many pleadings, Your Honor, I am just going to argue from counsel's table rather than going up to the podium, if –

THE COURT: That's fine.

MS. AKIBA: – if that would be all right with the Court.

THE COURT: That's fine.

MS. AKIBA: Your Honor, we brought this motion for remand because there was an improper removal notice filed by the third-party defendant – or fourth-party cross-claim defendant, Shirley Von Platen-Luder, in this case.

Ms. Von Platen-Luder attempted to remove this case based on jurisdiction under Section 1441 B, or, alternatively, C; and no such jurisdiction exists, Your Honor. There is no original jurisdiction under Court Section 1441 A or B; and this is not a proper case for removal under Section 1441 C, based on the third-party defendant's cross-claim.

Shirley Von Platen-Luder is not a defendant entitled to remove, within the meaning of the statute; and in the Ninth Circuit, as this Court is well aware, from the Hummel decision, removal is disfavored, and there is a stringent [p. 3] burden of proof on the party seeking to remove, particularly when a state court action has proceeded as far as this case has proceeded, Your Honor.

In the original case, Your Honor, as you have seen from the complaint and the causes of action at issue, there was no federal question at issue. The only basis was for the removal for the claims filed in the third- and fourth-party complaint by Mr. Adel Green's client, and that was the basis.

But the majority rule is that there shall be no removal under the statute, based on such third-party or cross-claim; just the original defendant may remove, and Shirley Von Platen-Luder is not that type of defendant.

We have briefed this fully, Your Honor, in our briefs; and rather than repeat what is in the moving papers, I would rather, Your Honor, submit on the briefs and let Your Honor ask me any particular questions that the Court may be considering – or may be pertinent to this Court's consideration of the motion.

THE COURT: Well, Ms. Akiba, as you know, this is not the first time this Court has visited this case, so I am familiar with it. We had colloquy at the last hearing on this matter, and so I don't believe I have any further questions.

MS. AKIBA: Thank you, Your Honor.

THE COURT: All right.

The government, I believe, opposes the motion – is [p. 4] that correct? –

MR. ROSS: The government, Your Honor –

THE COURT: – insofar as the government is concerned; it wants a severance.

MR. ROSS: The government – actually, the position of the government is that we think that the – the complaint, denominated the "fourth-party complaint," ought to be dismissed for lack of jurisdiction, and the case remanded to the state court. We have made a motion to dismiss for lack of jurisdiction, or for failure to state a claim.

Failing that, we would ask the Court to sever the so-called "fourth-party complaint"; and, at that point, we would have no feelings, one way or the other, about the remand of the portion of the case to which we are not a party.

We do feel very strongly about retaining – or remaining in federal court, insofar as we are a party to the fourth-party complaint.

THE COURT: Okay.

Anything further?

MR. ROSS: We have filed with the Court a supplemental memorandum which I think lays out our views on this matter reasonably well.

The one point that I would like to make to the Court is that the – both the RTC, the Resolution Trust Corporation, and the FDIC have their own removal statutes. It's not [p. 5] necessary that removal be made under the general removal statutes 1441, 1442, which is 12 USC 1819(b)(1) and 12 USC 1441(a)(b)(1)(B). Both deal with that.

And I would also bring the Court's attention to the Otero case out of the First Circuit which indicated that under the FDIC removal statute, it is not just the FDIC

which can remove, but any party to a case in which the FDIC is a named party is entitled to remove to federal court – under the FDIC removal statute.

It's a First Circuit case. It's not binding on this Court, but it does, I think –

THE COURT: You suggest that that gives Mr. Dubin's client authority to remove this case?

MR. ROSS: I suggest that it gives certainly a colorable legal claim for the removal attempted by Shirley Von Platen-Luder, yes, Your Honor.

I don't think that that case is binding on this Court. It's not a Ninth Circuit case, but I think that it does constitute significant precedent in support of the removal, albeit the removal was not – didn't cite that case. Perhaps it was flawed, in the sense of not citing the appropriate statutory authority; nonetheless, it appears to us that there was statutory authority there for the removal.

Thank you.

THE COURT: All right. I'll give Ms. Akiba an [p. 6] opportunity to respond to that.

Let me hear from Mr. Dubin.

MR. DUBIN: Your Honor, I always hoped that one day I will be a counsel in an ordinary case. I have probably yet to find exactly an ordinary case. This is an unusual case.

When we were here last, the Court said the purpose of this hearing would be to determine whether or not the

stay was in place; and if the stay was in place, then the Court would not go forward and Ms. Akiba would be the Court said she then knew what to do.

I did check – and, again, I was informed that the automatic stay by the trustee was in effect. He sent me the materials, with a cover letter to that effect, which I provided to the Court.

THE COURT: Well, Mr. Dubin, the record in the case would appear to indicate that the debtor has been discharged. Now, if the debtor is discharged, under the law the automatic stay is automatically dissolved, period.

MR. DUBIN: Your Honor, I asked that specific question of the people who were involved in that bankruptcy; and they told me that Mr. McCommon had opened it up – and he has an adversary proceeding that's still before the Court – that there was a settlement agreement between Mr. Montgomery and Mr. McCommon that the Court had assumed had been signed; and, on the basis of that, the Court issued its order. Then [p. 7] it turned out that it had not been signed.

THE COURT: Has the Court somehow absolved the order of discharge?

MR. DUBIN: If I can approach the bench, I – I asked Mr. Montgomery to explain it to me, and I received this fax from Mr. Montgomery this morning (tendering documents to the clerk and the opposing counsel). He is in a trial in Victorville now – I have the original here, I'm sorry – he was in a trial in Victorville, so, therefore, he had to do this at some other law firm's office.

And so this was his explanation.

THE COURT: (Perusing document.) Well, this is the opinion of one lawyer saying he's filed a motion –

MR. DUBIN: That's correct.

THE COURT: – which has not been decided. I mean, what he is saying here – when he makes his definitive statement that the agreement was never signed, and therefore the discharge has no effect, that's his position; it's his argument. He is an adversary. That's his argument.

MR. DUBIN: Well, I asked him to explain what the status of it was. Then I talked to Mr. Marshack, the trustee, this morning; and he said that the claim of Triton Continental against Montgomery was not – was not known or was not part of the discharge, because he was not listed, and that then they would have to reopen – as it is often done.

[p. 8] I was once involved in a bankruptcy in Alameda County where a similar thing happened; the estate had actually been closed – this has not been closed – and then they reopened it up, because, otherwise, this creates a problem.

So what I have been doing is I have been concentrating on trying to settle this part of this case, and to – involving all the Triton people – and I think that I do have a settlement between my group and the Triton people, and maybe between Montgomery and McCommon; and what I'm going to do now is to seek the approval of the bankruptcy court for the settlement, which may then remove all of this part of the case. That's what I am working on now.

THE COURT: All right.

MR. DUBIN: But at least the people I talked to, their feeling is that it has to go back before them because they feel that their job is affected by it.

THE COURT: All right.

Let me hear from Ms. Akiba, then.

MS. AKIBA: Your Honor, first let me respond to Mr. Dubin's last arguments, with respect to the bankruptcy, Your Honor.

Your Honor is correct in the fact that the purported stay and Mr. Dubin's arguments do not affect this Court's authority or jurisdiction to proceed on this motion.

We did brief this issue at length in the supplemental [p. 9] memorandum in support of the motion to remand, and for sanctions, which was filed on behalf of Honolulu Federal Savings & Loan Association on April 22nd, 1991, and is before the Court.

The docket demonstrates that although there was this motion to reopen, there apparently was some kind of resolution as to the dispute, and the proceeding has gone forward, and whatever resolution was received on that matter has not stopped the bankruptcy proceeding from winding down; and, in fact, the supplemental affidavit which Ms. McHenry recently filed with the Court indicates that upon checking with Trustee Marshack's office, we were informed that the final report will be issued shortly, which will be the actual very end of the proceeding, in which the trustee will obtain its fees, and the matter will be closed.

As Your Honor rightly points out, the debtor, Ronald McCommon, was discharged on August 1st, 1990; and, in fact, these claims contained in this lawsuit were discharged at that time. And I do not believe that the stay affects this proceeding.

In addition, Your Honor, we pointed out that the state court had entered an order on December 20th, 1988, regarding the request for a stay of these proceedings, which was denied. And this case proceeded, despite Mr. McCommon's bankruptcy.

[p. 10] If Your Honor has any questions on that, I would direct the Court to the supplemental memorandum.

Now, with respect to the arguments raised by the FDIC, although at this juncture now, Mr. Dubin has tried to ride on the coattails of the FDIC and the OTS, in terms of a Section 1442 removal, it is clear under the law that Shirley Von Platen-Luder is not a party entitled to remove under Section 1442.

In fact, Your Honor, if you look at the fourth-party claim, Shirley Von Platen-Luder is not even a party to that claim. She is not asserting a claim. She is not named in the claim. She is not the defendant in that claim.

We have also fully briefed that issue in the reply memorandum. Unless Your Honor wants to rehear that argument again, I would direct the Court to the reply memorandum –

THE COURT: Well, we don't have a lot of law on removal, because, under normal circumstances, the Court's decision to remand is non-appealable.

MS. AKIBA: Correct, Your Honor.

THE COURT: Now, I don't know whether this FDIC statute – I haven't looked at it carefully enough – is an exception to that.

Is there an exception to that?

MS. AKIBA: No, Your Honor. The 1442 removal provisions allow the agency or a representative of the agency [p. 11] to remove, Your Honor, under the statute –

THE COURT: Well, what if I remand? Does the agency have the right to appeal?

MS. AKIBA: No, there is no right to appeal a decision to remand – under Section 1442.

THE COURT: Even for the agency?

MS. AKIBA: Even for the agency.

THE COURT: Under its own statutes?

MS. AKIBA: Under its own statute, Your Honor.

THE COURT: There is just not very much law in this area, because once – that's one of the few instances in the law where, outside of a judgment of acquittal in a criminal case, district judges can make a decision which is non-appealable.

MS. AKIBA: And I think, Your Honor, as far as the FDIC and the OTS is concerned, if we do go back to state court before the Honorable Robert Klein, who is very well familiar with this case, they are not prejudiced – they may remove their motion to dismiss before the state court, and may very well be entitled to whatever

relief they seek, by way of the motion to dismiss – however, remand here is proper, based on the removal statutes that have been cited by both parties.

I believe Honfed is entitled to be granted its motion for remand, as well as an award of costs and fees, under either Section 1447 or under Rule 11, as this Court sees fit.

[p. 12] THE COURT: All right. The Court will take this matter under advisement. Counsel will have a decision in writing this week.

MR. DUBIN: Your Honor, thank you.

I didn't get a chance to respond to the substantive issue.

THE COURT: I thought you had already responded.

MR. DUBIN: No. I only addressed the stay.

THE COURT: Well, I gave you an opportunity, Mr. Dubin, to address whatever you wanted to address.

MR. DUBIN: Well, I was on the stay of (inaudible) – repeating itself to the Court. I did want to say something about it.

THE COURT: All right. No, I'll be perfectly happy to hear from you.

MR. DUBIN: Briefly, there are two points I wanted to mention: I was not in the case originally in the state court; that case languished for about two years. It was Ms. Akiba's decision, as well as mine, to allow the third-party complaint to be filed.

The Hawaii statute clearly provides that any party sued can file a cross-complaint for contribution, which was done – which is their right.

We believed, on a variety of bases which we have argued – and, of course, now we have an additional one – [p. 13] that removal was justified.

We think there are real federal issues involved here.

The case – the Court should understand that at the time that the case was removed, it was set for trial; and the judge, Judge Chun, took it off the trial calendar, over Ms. Akiba's objections, because the pleadings were not even complete.

Whether that case is tried here or tried there, it makes very little difference, in terms of the timing. This is not a case, despite the age – it was all set to go to trial, and then some clever lawyer tried to remove it. This was done on the basis of what we believe to be, honestly, the rights of my clients, whether right or wrong –

THE COURT: Well, lawyers say that all the time. Every time they remove a case, they tell the Court it was – you know, I know that the removal was done on the eve of the foreclosure hearing, but it's not –

MR. DUBIN: Let me tell Your Honor why I say that.

THE COURT: To say it was brilliant lawyering, you know –

MR. DUBIN: Let me tell your Honor why I say that.

In this case – I wouldn't normally say that – there is a reason why I say that. Because if Your Honor will read – as Your Honor has done – Ms. Akiba's work, you will see a majority of that is a personal attack, trying to make it [p. 14] appear that we were afraid of the state courts and we ran across here, looking for some help.

I point out to the Court we were offered a settlement; that everybody could walk and leave.

THE COURT: I don't know that you would necessarily come here for help. You didn't fare very well in a similar motion before Judge Kay, so this has not been the most friendly of forums. So I'm not accusing you of – nor would I accuse you of running here for help.

MR. DUBIN: Well, actually, that opinion by Judge Kay was actually very helpful to us on the major issues.

THE COURT: Well, didn't he issue sanctions in that case?

MR. DUBIN: The sanctions – I haven't seen whether they have been reconsidered, or not, but we have –

THE COURT: Did he issue sanctions?

MR. DUBIN: He issued sanctions, but now it's been two months. I don't know if the decision has come out, but we asked for reconsideration –

THE COURT: Oh.

MR. DUBIN: – so I am still hopeful –

THE COURT: So the point is – I'm not suggesting – that's neither here nor there. I am just saying that I don't see this as a – the forum where you –

MR. DUBIN: I –

[p. 15] THE COURT: – so I agree with you that this is not a place where you would necessarily run for solstice.

MR. DUBIN: I'm just trying to give the Court the perspective on that. Two major substantive issues in that case, he ruled in our favor – despite the sanctions, or whatever – that was a major victory for my clients.

THE COURT: It was.

MR. DUBIN: It was – as I have explained in my papers for reconsideration. I would be happy to explain to the Court that on the major –

THE COURT: No, I don't want to try Judge Kay's cases. I have my own case, but I – I –

MR. DUBIN: I know, but, you see, in state court, the judge ruled against us and threw us out, a couple of years ago, on the same issues. Judge Kay ruled that there was federal jurisdiction.

Going back to the issue here, we didn't run here; and I just find that it's – the reason I mention this is because it's difficult, when the Court is bombarded with all of this stuff, which, frankly, is absolutely untrue about what was actually going on in the state court, that it's hard for counsel to –

THE COURT: Mr. Dubin, I will decide this matter on its merits. Ad hominem attacks – both ways –

occurred, in this case, between counsel. They do not, in any way, play a [p. 16] role in any decision I make in any matter, unless I can see for myself and have made a determination – where I do so, I do so on the record – of misconduct by a lawyer. But even where I see misconduct by the lawyer, I try to separate that from the interests of the client.

This case will not be decided based upon allegations of misconduct – or motives other than appropriate motives – by you. They will be decided – the issues here will be decided on the merits of those issues, one way or the other.

MR. DUBIN: Well, thank you, Your Honor. I was merely explaining why I felt the necessity –

THE COURT: All right –

MR. DUBIN: – on the record –

THE COURT: – do you have any other arguments on the merits?

MR. DUBIN: No. I think they are all contained in the papers. Thank you.

THE COURT: All right. This Court will take this matter under advisement; and, as I indicated to counsel, you will receive your decision this week.

Are you here for something else, Counsel?

MR. ROSS: No.

THE COURT: And you are going to go back to Washington?

MR. ROSS: Going back to San Francisco.

[p. 17] THE COURT: Oh, San Francisco. Oh. You don't come from as far as Washington. I see. All right.

MR. ROSS: No. We have some other business to attend to.

MS. AKIBA: He's still waiting on the bags.

THE COURT: All right. You have a pleasant stay and a pleasant trip back.

MR. ROSS: Thank you.

THE BAILIFF: All rise. This court is now in recess.

(The proceedings in the above-entitled matter were concluded at 10:07 a.m.)

I, Stephen B. Platt, Official Court Reporter, United States District Court, District of Hawaii, do hereby certify that the foregoing is a true and correct transcript of proceedings in Honolulu Federal Savings & Loan Association versus Triton Continental Properties Joint Venture, et al., Civil Number 91-00050DAE, at Honolulu, Hawaii, on Monday, July 1, 1991, before the Honorable David A. Ezra, United States District Judge.

TUESDAY, JULY 23, 1991

/s/ Stephen B. Platt
STEPHEN B. PLATT, CSR NO. 248

7

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF HAWAII

HONOLULU FEDERAL SAVINGS AND LOAN ASSOCIATION, Plaintiff, vs. TRITON CONTINENTAL PROPERTIES JOINT VENTURE, TRITON CONTINENTAL PROPERTIES CORPORATION, MICHAEL B. MONTGOMERY, HUGO VON PLATEN-LUDER, ABRAHAM GROSSMAN, RONALD D. McCOMMON, and CALIFORNIA-HAWAIIAN FUND, INC., Defendants.	CIVIL NO. 91-00050 DAE
CALIFORNIA-HAWAIIAN FUND, INC., a Hawaii corporation, for itself and as assignee, Third-Party Plaintiff, vs. TRITON CONTINENTAL PROPERTIES CORPORATION, a Hawaii corporation, Third-Party Defendant, and	

ALVIN K.H. CHEE, JAMES ADRIAN ADAMS, HUGH P. CONSER, CHEE-HIRONAKA, a Hawaii General partnership, SAM S. HIRONAKA, and JOHN DOES 1-10, JANE DOES 1-10, DOE PARTNERSHIPS 1-10, DOE CORPORATIONS 1-10, DOE FINANCIAL INSTITUTIONS 1-10, DOE ENTITIES 1-10, and DOE GOVERNMENTAL UNITS 1-10,

Additional Third-Party Defendants.

TRITON CONTINENTAL PROPERTIES CORPORATION, ALVIN K.H. CHEE and JAMES ADRIAN ADAMS,

Cross-Claimants,

vs.

MICHAEL B. MONTGOMERY, HUGO VON PLATEN-LUDER and RONALD D. McCOMMON,

Cross-Claim Defendants,

and

SHIRLEY VON PLATEN-LUDER and ABRAHAM GROSSMAN,

Additional Cross-Claim Defendants.

HUGO VON PLATEN-LUDER,

Fourth-Party Plaintiff,

vs.

FEDERAL DEPOSIT INSURANCE CORPORATION, OFFICE OF THRIFT SUPERVISION, RESOLUTION TRUST CORPORATION, United States Federal Corporations and Agencies, jointly and severally,

Fourth-Party Defendants.

TRANSCRIPT OF PROCEEDINGS

The above-entitled matter came on for hearing on Tuesday, August 6, 1991, at 2:30 P.M., at Honolulu, Hawaii,

BEFORE:

HONORABLE DAVID A. EZRA, U.S. District Judge.

APPEARANCES:

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Attorney for the Defendant, Counterclaimant, Third-Party Plaintiff, and Third-Party Counterclaim Defendant California-Hawaiian Fund, Inc.; for Defendants, Counterclaimants, and Third-Party Cross-Claim Defendants Michael B. Montgomery and Ronald D. McCommon; for Defendant, Counterclaimant, Third-Party Cross-Claim Defendant, and Fourth-Party Plaintiff Hugo von Platen-Luder; and for Third-Party Cross-Claim Defendant and Removal Petitioner Shirley von Platen-Luder;

ADELBERT GREEN, Esq.
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Attorney for Third-Party Defendants/Cross-Claimants Triton Continental Properties Corporation, Alvin K.H. Chee, James Adrian Adams, Chee-Hironaka and Sam S. Hironaka;

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Attorney for Fourth-Party Defendants Federal Deposit Insurance Corporation, Office of Thrift Supervision and Resolution Trust Corporation.

[p. 5] THE CLERK: Civil No. 91-00050 DAE, Honfed versus Triton, et al. This hearing has been called for a status conference.

THE COURT: All right, may I have appearances, please?

MS. AKIBA: Good afternoon, your Honor, Lorraine Akiba for plaintiff Honolulu Federal Savings and Loan Association.

MR. DUBIN: Good afternoon, your Honor, Gary Dubin representing the Cal-Hawaiian defendants.

I apologize to the Court; I was informed it was a chambers conference.

THE COURT: You represent who, Mr. Dubin, I'm sorry?

MR. DUBIN: The Cal-Hawaiian Fund.

THE COURT: Cal-Hawaiian.

MR. DUBIN: Yes, and the reason I'm not. . . .

THE COURT: I didn't understand you.

MR. DUBIN: The reason I'm not dressed in a suit, I was informed it was a chambers conference, and I apologize to the Court.

THE COURT: It's all right, Mr. Dubin; no problem.

MS. WEE: Good afternoon, your Honor, Beverly Wee on behalf of the fourth-party defendants.

MR. GREEN: Good afternoon, your Honor, Del Green [p. 6] appearing on behalf of Triton Continental

Properties Corporation, Alvin Chee, James Adams, Chee-Hironka and Sam Hironka.

THE COURT: All right, I called the status conference, because I have received some correspondence which apparently has been copied to all parties regarding – and there's been some confusion in our Clerk's Office – regarding the removal which was filed by the United States, as to precisely what was and what was not removed back to this Court.

Now, I'll hear from, first of all, Miss Wee on that.

MS. WEE: Thank you, your Honor.

When the FDIC filed its petition for removal last week, it was the intent of said agency to remove only that action to which it was a party, that is, the fourth-party complaint; and it was the intent of the FDIC to remove only that part of it.

THE COURT: Is that what your removal petition said?

MS. WEE: Admittedly the removal petition is probably not as explicit as it could be.

THE COURT: Do you have any authority that the FDIC can simply remove the fourth-party complaint and not the entire case?

[p. 7] MS. WEE: The best that we can do, your Honor, is to cite to the statute itself, 12 U.S.C. 1819(b) (2), and to the case that we had filed and submitted in connection with the declaration that I filed on August 2nd, 1991, the FDIC versus Israel case.

We believe that that case stands for the proposition that under 12 U.S.C. 1819, any suit to which the FDIC is a party may be removed under that section, and that's the basis.

THE COURT: Well, what does "suit" mean? What does "suit" mean?

MS. WEE: Any action, including a fourth-party action.

THE COURT: Well, I understand that; but the question is whether everything else comes with it, or the FDIC just gets removed by itself, which is what you're trying to do.

What is encompassed within "suit"?

The suit here, it could be the entire case or it could be just the fourth-party complaint. Do you have anything to support your theory that you only – you can pick and choose what you want removed?

MS. WEE: Well, your Honor, it's our understanding, and based on the pleadings that are on record in this case, that the fourth-party action is the only [p. 8] action that has any type of federal basis or federal parties, federal cause of action. Although Israel does not involve the precise situation, I believe the Court there did discuss that any pendent claims in which the FDIC was not involved would not necessarily be removed, or that the Federal Court would not have jurisdiction over such a case.

So, while I don't have anything quite on point, we do believe that the case affords a basis for such an action.

THE COURT: It seems to me that this should have been litigated. This doesn't seem to me like it would be an exactly novel circumstance. Nobody's been able to find anything directly on point.

MS. WEE: Not that I'm aware of, and we did confer with our Washington counsel. We did confer with the DOJ in Washington, and no one had been able to come up with anything more than what we've submitted to the Court.

THE COURT: All right. Miss Akiba.

MS. AKIBA: Yes, Your Honor.

As far as the response from Honfed, we don't necessarily have any objection to the fourth-party defendants' attempt to remove only the fourth-party complaint.

We would, however, reserve our position as far as removing the entire action. I think, for the same reasons that we were before your Honor before on the prior improper [p. 9] removal by the third-party defendant, cross-claim defendant Shirley von Platen-Luder, the predominant claims in this case are State law claims; and the fourth-party complaint is the only thing that conceivably involves even a federal entity.

THE COURT: The question is, in my view, in looking at this, is the fourth-party complaint severable? Can it be tried independently without violence to the ends of justice and the rest of the case, or is it inextricably entwined with the rest of the action?

MS. AKIBA: Well, I think, your Honor, we argued in the alternative in the motion to remand that was previously before the Court, that the Court had the

discretion if it felt that jurisdiction should be exercised over the FDIC and fourth-party complaint, to sever out the claim, and stay the action pending the outcome of the State claims and the other claims preceding this fourth-party complaint.

I think that's still an option, and I believe that may be one of the claims for relief for one of the motions that the fourth-party defendants make, the exploring, if and when this case stays up here.

THE COURT: Well, let's go back to the question which I asked; and that is, whether these are severable in fact or inextricably intertwined.

[p. 10] In other words, are you going to have to retry the entire case, in order to retry the fourth-party complaint, or can it be discretely tried without great expense and inconvenience to all parties?

MS. AKIBA: I think the difficulty with that is, if your Honor looks at the fourth-party complaint, it's not the most, in all deference to Mr. Dubin, it's not the most specifically drafted fourth-party claim or complaint. It merely says that if the fourth-party defendant is held liable for claims brought against – fourth-party plaintiff is held liable for claims brought against it, that it will seek claim for contribution and indemnity. Then it attaches a class action complaint that has since been dismissed in the other action pending before Judge Kay.

I think that it is not a separate and independent claim to the extent that the only time liability will become an issue with respect to the fourth-party plaintiff and the fourth-party defendants named is – and only if – the

fourth-party plaintiff Hugo von Platen-Luder is somehow found liable on any of the claims brought by Mr. Del Green's clients.

THE COURT: Thank you, Miss Akiba. Mr. Dubin.

MR. DUBIN: Your Honor, I have a couple of things to say which I was unable to address the Court on a motion for reconsideration.

[p. 11] THE COURT: No, no, we're not going to have a motion for reconsideration.

MR. DUBIN: No, I know that's true, but I want to explain that it was gone from this Court; and, of course, now we're back on this other issue.

THE COURT: Well, we're just – we're not going to reconsider the Court's previous. . . .

MR. DUBIN: I appreciate that, your Honor.

THE COURT: So I don't want to hear a rehash, Mr. Dubin . . .

MR. DUBIN: I don't intend to do that.

THE COURT: . . . of previous arguments. I want to hear only the discrete motion which is before the Court, the matter.

MR. DUBIN: It was curious to me. I think the case was called in the prior action. I may be wrong, but I think the new removal has a different case number than the case that was called here.

THE COURT: I don't believe so.

MS. AKIBA: No.

MR. DUBIN: Is it the same case?

MS. AKIBA: It's the same case.

MR. DUBIN: I apologize, I didn't notice that.

Let me point out that, first of all, the class action complaint was amended as the first amended class [p. 12] action complaint. The pleadings are not even complete. My clients would object to the separation, because we don't believe that the two can be divided intelligently.

THE COURT: Why?

MR. DUBIN: Because it's all intertwined. We would have to. . . .

THE COURT: You're giving me back my words. I don't want to just hear words, I want to hear a reason. Tell me a reason.

MR. DUBIN: First of all, the State court precedent treats the contribution claim as in effect a part of what the Hawaii cases call the main claim, which is in this case the fourth-party complaint.

THE COURT: Well, a contribution claim, Mr. Dubin, can be made at the conclusion, can be filed at the conclusion of the previous action. It doesn't even need to be filed in the same case; it is not a compulsory counterclaim.

MR. DUBIN: That's correct. But the reason why it normally is filed. . . .

THE COURT: It's not normally filed.

MR. DUBIN: It can be. The reason the statute gives a person the right to, because they don't want to wait until we litigate that later, after they may have some liability.

[p. 13] THE COURT: Well, in many cases they do wait for many number of reasons, including strategy. They don't want to air their dirty laundry in the previous case, thereby setting forth, if you will, a basis or a stirrup by which the other party can climb up into the saddle. They would prefer to wait and see if they get hit; and then if they do get hit for some damage, then they can turn around, and at that point, without the potential for increasing their exposure, air whatever grievances they may have amongst themselves.

MR. DUBIN: Exactly, and I have been in that situation. That's where, in the case of a joint tortfeasor case. But here, the parties weren't, for example, like partners that had a feud and are blaming each other. This is where the complaint is against one party for fraud in not preforming. The other party has a totally – a defense which relates to this case with the government; and it's not like any usual case where we might have two parties explaining them when. . . .

THE COURT: All right, but the liability in this case is dependent upon the finding of liability in the other case, isn't it?

MR. DUBIN: That's correct.

THE COURT: All right.

MR. DUBIN: That's correct; but to try that, [p. 14] because this is not a case like, as you suggested,

between two parties that don't want to hang the dirty linen. This is a case where the government is accused of having interfered with the ability of the joint venture to get the loan in the first place, which is a pendent (phonetic) defense to the action.

THE COURT: That defense, though, can be raised in the other case as a matter of your claim in the other case.

MR. DUBIN: I think it's a question of whether you wind up – it definitely can.

It's a question of whether the effort is worth it to try the two cases together.

THE COURT: Well. . . .

MR. DUBIN: That's. . . .

THE COURT: This is a Court – you may be seated, Mr. Dubin; thank you.

This is a Court of limited jurisdiction. The United States courts are not the courts of first resort for state law type of claims. I mean, diversity is of course the exception; but we are not the place where people should normally be trying their state law causes of action.

Now, this Court found in the previous motion that this case was predominantly, if not almost exclusively, a State court case, and it should not have been removed. The United States sought to remove a discrete portion of this [p. 15] case, which is the fourth-party complaint.

Now, if the other portions of the case were otherwise properly removable, had other types of claims; even if

those claims could properly be tried in State court, but nonetheless had significant federal causes of action, then the Court would surely view this differently. But I see no purpose served in bringing the entire State court case back into Federal Court, simply to satisfy a discrete, independent fourth-party complaint which is totally dependent for its validity upon a finding of liability in the previous case.

So the United States certainly has the right to remove their fourth-party complaint, but this Court doesn't see any legitimate purpose in bringing everything else up with it. It would be different if they were inextricably intertwined in the first instance; they really are not. While it's true there may have to be some retrial of certain issues, those can be honed down and more precisely determined in the State court case.

So I see no legitimate reason why this Court should divest the State court of jurisdiction over a matter which is properly before the State court in which the interest of your client, Mr. Dubin, can be adequately protected. I know you feel, and your papers have made it clear, both before me and Judge Kay, that you get a better [p. 16] deal here. You feel like the stack is against you in State court, for whatever reason.

I'm not going to comment on that. I haven't seen that, but I know you personally feel that. There may be some animosity in State court, or something of that nature.

MR. DUBIN: Can I address that issue, your Honor, since you raise that?

THE COURT: Yes.

I'm not criticizing you.

MR. DUBIN: No, no, no. This Court has things that the State court doesn't have for these kinds of issues. It has law clerks, for example.

THE COURT: They have law clerks in State court.

MR. DUBIN: It has judges who are sitting here for a life tenure.

For this kind of case, it's not an issue whether we're being treated fairly or not in State court. This whole thing began because the statute and the cases that I saw establish that if the federal agencies were involved, and federal agencies have the right under the statute now, the new statute, not only to remand – excuse me, not only to remove, but also to appeal; and our argument is that if the Congress gives the right to remove to the federal agencies, then my client had the right to remove.

Now, one, the cases say that it doesn't matter if [p. 17] the incorrect statute is cited in the removal petition. That's point No. 1.

THE COURT: Well, there was much more . . .

MR. DUBIN: Okay, what . . . .

THE COURT: . . . effective . . .

MR. DUBIN: Secondly. . . .

THE COURT: . . . with your removal than that.

MR. DUBIN: Secondly, the removal petition was joined in . . . .

THE COURT: Mr. Dubin, you're now starting to attempt to reargue, and the Court is not interested in allowing you to rehash and reargue . . .

MR. DUBIN: But . . . .

THE COURT: . . . the previous ruling by this Court.

I'm not going to let you do it, Mr. Dubin, we're not here to do that.

MR. DUBIN: I appreciate that, but there is an irony here; in that now the federal government is back.

THE COURT: Well, with their part of the case.

MR. DUBIN: With their part of the case.

THE COURT: Yes, and they have a specific right to remove, because the Congress has given them that right.

MR. DUBIN: That right . . . .

THE COURT: Your client doesn't have the specific right to remove.

[p. 18] MR. DUBIN: But there is an issue that has not been addressed by this Court; the effect of them in their papers saying that they supported the original removal as effectively being their option at that time to have removed and have joined the petition to have removed the entire thing; because right now the 30 days for the government to have removed . . . .

THE COURT: Miss Wee has clarified the government's position. Their papers may have been more

articulate, I don't know. But, the fact of the matter is, she's made it very clear. This Court doesn't rule, if it can avoid it, on technicalities. Sometimes you can't avoid it, because the law won't allow you to avoid it. I like to go to the substance and the heart of the matter, and get to what I call substantive justice.

Now, I've asked Miss Wee what her position was, what she was attempting to remove; and her position is that whether her papers spelled out as articulately as she would like them to have done at the time, in hindsight – and hindsight is wonderful; too bad we all don't have hindsight. This Court could do a lot of other things, if I had hindsight. You know, 20/20 hindsight, I can look ahead of time and see where the Court of Appeals was going to disagree with me, I wish I had that power; and never be reversed. I don't.

[p. 19] So – and the Court of Appeals doesn't, either, because they get reversed on occasion by the Supreme Court; and even the Supreme Court reverses itself on occasion.

So the fact of the matter is that Miss Wee has made it abundantly clear to this Court that she intended to remove only – and that is what she thought she was doing – the fourth-party complaint only. Given that, I'm going to take her at her word.

MR. DUBIN: I have not filed an objection. All I'm informing the Court is that we filed a removal petition. The government joined in it, exercised their option within the 30 days, and joined our removal petition. The 30 days is now up for the government to do this.

They originally filed a paper in this Court, joining in our removal petition, and that's our basis for the jurisdiction. And that's why we are going to take this to a higher court, with all due respect. I'm not here – I was invited here – I'm not here to argue this issue to the Court.

THE COURT: No, you want to argue the previous motion.

MR. DUBIN: Well, no, I'm just saying, as far as I'm concerned, it's still here because the government joined in; that the government has the right to remove now, they had the right to join in the removal with us, and that's our [p. 20] point.

THE COURT: Well, his point, Miss Wee, is that you waited too long to attempt to remove the case.

MR. DUBIN: No; you see, Your Honor, my point is that they didn't wait too long. They joined in with us.

THE COURT: Well, no, I'm talking about the present motion.

MR. DUBIN: Well, it puts us in an anomalous situation; because we're going to take the position that the case really is still here in federal juris – you know. It should be here, anyway. But we haven't taken a position against their removal of the fourth-party complaint. I haven't filed an objection to that, I'm just responding what the Court has asked me.

I just want to point out to the Court that our position is that they have the right to remove. They've already

removed, they joined in in our petition. And it's anomalous now, that they have the right to come back into this . . . .

THE COURT: I don't think that was Miss Wee's position.

MR. DUBIN: I can show Your Honor in the motion papers.

THE COURT: Let me hear Miss Wee, please.

MR. DUBIN: Okay.

[p. 21] MS. WEE: Your Honor, what we did in connection with Honfed's original motion to remand was to oppose that motion to the extent it would remove the fourth-party action.

THE COURT: That was my understanding, Mr. Dubin.

MS. WEE: And we see that as entirely consistent with what we have attempted to do here.

THE COURT: All right. The Court is going – Mr. Dubin, that's enough.

MR. DUBIN: I would just like to respond.

THE COURT: No, we don't need to have any response, Mr. Dubin. You have indicated that you wish to take this up on appeal; at the appropriate time you will do so.

I don't fault you for doing that. I think lawyers, when they appeal me, are doing their job. When I was a practicing lawyer, I appealed my colleagues on the bench; sometimes successfully, and sometimes not. The fact of the matter is, that's part of every lawyer's job.

Miss Wee is taking me up, I think, or her office certainly has, plenty of times. Miss Akiba has gone up on appeal in a case. I don't know what happened to that, but she took me up on appeal; and I ruled against her. And I've ruled against you in this case, and now you can take me up on appeal.

[p. 22] MR. DUBIN: And, your Honor, in 20 years . . .

THE COURT: Perfectly as well, I don't have any problem with that.

MR. DUBIN: . . . in the 20 years I've practiced law, I've been wrong many times myself; so I don't have trouble with that, either. I just want to point out for the record that my client removed; the government supported our removal, but then wanted the Court to remand part of the case.

THE COURT: No, they didn't support. They supported the removal only insofar as it related to them.

MR. DUBIN: If your Honor will give me until tomorrow, I will show you in the motion papers where in fact they supported the removal petition, only asking for a remand of the partial part of the case. And for jurisdictional purposes, that's a totally different thing, and that's just the point I'm making. I'm just trying to point out what the record says.

THE COURT: All right, Miss Wee has made it very clear what she intended to do. What she is telling me now is what I understood she was doing. You may have a different understanding. She's indicated she may not have been as precise as she would have liked to have been, in hindsight, on her papers. Doesn't make any difference, the Court now understands what she – and did understand at that [p. 23] time what she was attempting to do. She's confirmed that understanding to me; and it now appears that what we have is, we have two cases.

We have a case which is the fourth-party complaint, which is entirely severable, which is a federal case now, as a result of the appropriate removal by the United States, and which is not dependent for – and it's not so interdependent that it can't be properly tried separately, nor is there going to be any prejudice to any party in the State case, outside of the thought that it may be somewhat more expensive, because you might have to litigate twice; but then, again, you might not have to, because if the case resolves itself against the fourth-party plaintiff, there won't be any need for contribution anyway.

So it's really a case which is dependent, and there may not be any need for the case. It may go away of its own volition. So the Court is going to treat this as two separate cases. I am not going to treat the case which is presently in State court, in which Judge Klein has, at this time, I understand, had motions under advisement.

MS. AKIBA: Pending for hearing, your Honor.

THE COURT: Pending for hearing; and that case is going to go on without interference from this Court. It's been remanded, it's going to stay remanded.

The only thing that's been removed to this Court is the fourth-party [p. 24] complaint.

Now, that is a live case; but, it would appear that it would be appropriate for that case to be stayed pending the outcome of the underlying State action; because this case has no basis for liability, nor any way to fix damages, short of a finding on the State case. I can't imagine how you could truly proceed.

Now, if you want, Mr. Dubin, the Court will consider, upon appropriate motion, entering an order allowing the use of the discovery in the State case in this case; so that depositions and other discovery need not be retaken, such as are appropriate.

You understand what I'm saying?

MR. DUBIN: Yes, I do understand.

THE COURT: And that should obviate to a substantial degree any cost or expense which you may claim may be incurred as an additional result; because the only thing you'll have to do is then come in and try the case. That fourth-party case is not that lengthy a case.

Now, I don't know that there's a need for a separate order in this case, because this is what I thought was happening all along.

Is there a need for a separate order? This is just a status conference, and to clarify the understanding of the parties as to what's going on, so everyone has the [p. 25] same understanding.

MS. WEE: I think that's correct, your Honor. And we did file an application for a writ and an order

directing the Clerk of the Court to remove strictly, I thought, the fourth-party action, so that should suffice to keep the matters.

THE COURT: Well, you may want to prepare an order, Miss Wee, which makes sure that that is precisely what is done; because I don't know exactly what the Clerk is going to do with what was sent down there.

MS. WEE: Okay; I will do that, your Honor.

THE COURT: Understand what I'm saying? Because they may take that to mean – in other words, if you're not precise, it may end up over at Circuit Court, and the Circuit Court Clerk may send the whole file over here, the whole thing, and then we're going to be right back asking me to issue an order sending back, because the Clerk won't do that of their own volition, sending back what they sent over. And then you're going to have a real nightmare with these files flying back and forth across the street, and then back across the street again.

MISS WEE: And given the paper in this case, your Honor, I know that's going to be cumbersome.

THE COURT: And you don't want to have it all come flying over here, if it's unnecessary. It just doesn't make [p. 26] any sense or logic. I don't want to incur any additional cost to Mr. Dubin's clients either, here.

MR. DUBIN: Well, there's two additional issues, though.

One, the pleadings are not complete in the other case; and it's likely that the government will be brought in, in additional pleadings. That matter we may be able to take

care of by stipulation in relationship to how it affects this ruling.

Secondly, there may be issues of discovery that involve the government, where we may be at a disadvantage in State court.

THE COURT: Why?

MR. DUBIN: The government may not make themselves available; for example, documents that may be needed, where we might have an opportunity to seek those documents from . . .

THE COURT: Well, there are ways . . . .

MR. DUBIN: . . . third parties.

THE COURT: There are ways to do that without having, you know, have an active lawsuit going against them.

MR. DUBIN: No, it could be a problem that . . . .

THE COURT: No, I don't . . . . Look, Mr. Dubin, let's not create problems where none exist. You don't know that the government is going to give you a problem.

MR. DUBIN: No, but I would feel – I'm not sure. [p. 27] You had indicated that they removed the fourth-party complaint; and then part of it would be stayed.

THE COURT: Well, somebody's got to make a motion.

MR. DUBIN: Oh.

THE COURT: I said it was a live controversy. I said it appears to me that the thing to do would be to stay it, but somebody's got to make a motion. Right now it's a live case; it's sitting there in the Clerk's Office as a live case . . .

MR. DUBIN: Oh.

THE COURT: . . . and the Clerk is going to do things like set Rule 16 Conferences before the Magistrate, and all that. It doesn't seem to me like that makes a lot of sense, here.

MR. DUBIN: Well, these are things we may be able to work out between counsel.

THE COURT: Yeah, I think counsel can talk and work those out, and submit a stipulation to the Court. Or, if somebody can't stipulate, then somebody will have to file a motion, and then the Court will take that up.

All right? Anything else?

(Pause)

THE COURT: All right, thank you very much.

MS. AKIBA: Thank you, your Honor.

MS. WEE: Thank you, your Honor.

[p. 28] (The proceedings were adjourned at 3:03 P.M., August 6, 1991.)

I, Yukie H. Ichikawa, Official Court Reporter, United States District Court, District of Hawaii, Honolulu, Hawaii, do hereby certify that the foregoing is a true and

correct transcript of proceedings in Civil No. 91-00050 DAE, HONOLULU FEDERAL SAVINGS AND LOAN ASSOCIATION versus TRITON CONTINENTAL PROPERTIES JOINT VENTURE, et al., etc., held in the above-named Court on August 6, 1991, before the Honorable David A. Ezra, United States District Judge.

August 7, 1991 /s/ Yukie H. Ichikawa

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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

HONOLULU FEDERAL SAVINGS AND LOAN ASSOCIATION, Plaintiff, vs. TRITON CONTINENTAL PROPERTIES JOINT VENTURE, TRITON CONTINENTAL PROPERTIES CORPORATION, MICHAEL B. MONTGOMERY, HUGO VON PLATEN-LUDER, ABRAHAM GROSSMAN, RONALD D. McCOMMON, and CALIFORNIA-HAWAIIAN FUND, INC., Defendants.	CIVIL NO. 91-00050 DAE NOTICE OF REMOVAL OF ACTION UNDER 28 U.S.C. § 1441(b) (FEDERAL QUESTION); EXHIBITS "A" THROUGH "H" (Filed Jan. 23, 1991)
CALIFORNIA-HAWAIIAN FUND, INC., a Hawaii corporation, for itself and as assignee, Third-Party Plaintiff,	

vs.

TRITON CONTINENTAL PROPERTIES CORPORATION, a Hawaii corporation,

Third-Party Defendant,

and

ALVIN K.H. CHEE, JAMES ADRIAN ADAMS, HUGH P. CONSER, CHEE-HIRONAKA, a Hawaii General partnership, SAM S. HIRONAKA, and JOHN DOES 1-10, JANE DOES 1-10, DOE PARTNERSHIPS 1-10, DOE CORPORATIONS 1-10, DOE FINANCIAL INSTITUTIONS 1-10, DOE ENTITIES 1-10, and DOE GOVERNMENTAL UNITS 1-10,

Additional Third-Party Defendants.

TRITON CONTINENTAL PROPERTIES CORPORATION, ALVIN K.H. CHEE and JAMES ADRIAN ADAMS,

Cross-Claimants,

vs.

MICHAEL B. MONTGOMERY, HUGO VON PLATEN-LUDER and RONALD D. McCOMMON,

Cross-Claim Defendants,

and
SHIRLEY VON PLATEN-LUDER
and ABRAHAM GROSSMAN,

Additional
Cross-Claim
Defendants.

HUGO VON PLATEN-LUDER,

Fourth-Party
Plaintiff,

vs.

FEDERAL DEPOSIT INSURANCE CORPORATION, OFFICE OF THRIFT SUPERVISION, RESOLUTION TRUST CORPORATION, United States Federal Corporations and Agencies, jointly and severally,

Fourth-Party
Defendants.

NOTICE OF REMOVAL OF ACTION UNDER
28 U.S.C. § 1441(b)

TO THE CLERK OF THE ABOVE-ENTITLED COURT:

PLEASE TAKE NOTICE THAT ADDITIONAL CROSS-CLAIM DEFENDANT SHIRLEY VON PLATEN-LUDER HEREBY REMOVES TO THIS COURT THE STATE COURT ACTION DESCRIBED BELOW:

1. On January 16, 1991, an action was commenced against SHIRLEY VON PLATEN-LUDER in the First Circuit Court of the State of Hawaii, as an "Additional Cross-Claim Defendant" therein.

2. Attached hereto as Exhibits "A" through "H" are the pleadings in that state court action.

3. This action is a civil action of which this Court has original jurisdiction under Section 1331 of Title 28, U.S.C., and is one that may be removed to this Court by this party pursuant to the provisions of Section 1441(b) of Title 28, U.S.C., in that it involves numerous federal questions pertaining to violations of security laws of the United States, banking laws of the United States, perjury laws of the United States, and also has as parties federal corporations and/or agencies.

4. This party has not yet answered the pleading against her in state court; it is believed that all other parties similarly situated will join in this removal petition; however, at the present time service has not been effected on several of them.

5. This party requests that the entire action be removed or such parts as this Court deems proper upon a hearing thereof.

DATED: Honolulu, Hawaii; January 22, 1991.

/s/ Gary Victor Dubin
GARY VICTOR DUBIN
Attorney for Additional
Cross-Claim Defendant
Shirely [sic] Von Platen-Luder

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Defendants Federal Deposit Insurance
Corporation, Office of Thrift Supervision
and Resolution Trust Corporation

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

HONOLULU FEDERAL SAVINGS AND LOAN ASSOCIATION, Plaintiff, vs. TRITON CONTINENTAL PROPERTIES JOINT VENTURE, TRITON CONTINENTAL PROPERTIES CORPORATION, MICHAEL B. MONTGOMERY, HUGO VON PLATEN-LUDER, ABRAHAM GROSSMAN, RONALD D. McCOMMON, and CALIFORNIA-HAWAIIAN FUND, INC., Defendants.	CIVIL NO. 91-00050 DAE FOURTH PARTY DEFENDANTS' SUPPLEMENTAL MEMORANDUM IN SUPPORT OF OPPOSITION TO MOTION FOR REMAND; CERTIFICATE OF SERVICE (Filed Apr. 8, 1991)

CALIFORNIA-HAWAIIAN FUND, INC., a Hawaii corporation, for itself and as assignee, Third-Party Plaintiff, vs. TRITON CONTINENTAL PROPERTIES CORPORATION, a Hawaii corporation, Third-Party Defendant, and ALVIN K.H. CHEE, JAMES ADRIAN ADAMS, HUGH P. CONSER, CHEE-HIRONAKA, a Hawaii General partnership, SAM S. HIRONAKA, and JOHN DOES 1-10, JANE DOES 1-10, DOE PARTNERSHIPS 1-10, DOE CORPORATIONS 1-10, DOE FINANCIAL INSTITUTIONS 1-10, DOE ENTITIES 1-10, and DOE GOVERNMENTAL UNITS 1-10, Additional Third-Party Defendants. TRITON CONTINENTAL PROPERTIES CORPORATION, ALVIN K.H. CHEE and JAMES ADRIAN ADAMS, Cross-Claimants,	Date: April 12, 1991 Time: 9:45 a.m. Judge: David A. Ezra

vs.

MICHAEL B. MONTGOMERY, HUGO VON PLATEN-LUDER and RONALD D. McCOMMON,

Cross-Claim Defendants,

and

SHIRLEY VON PLATEN-LUDER and ABRAHAM GROSSMAN,

Additional Cross-Claim Defendants.

HUGO VON PLATEN-LUDER,

Fourth-Party Plaintiff,

vs.

FEDERAL DEPOSIT INSURANCE CORPORATION, OFFICE OF THRIFT SUPERVISION, RESOLUTION TRUST CORPORATION, United States Federal Corporations and Agencies, jointly and severally,

Fourth-Party Defendants.

FOURTH PARTY DEFENDANTS' SUPPLEMENTAL MEMORANDUM IN SUPPORT OF OPPOSITION TO MOTION FOR REMAND

I. SUMMARY

Fourth-Party Defendants ("FPD") file this Supplemental Memorandum to address two limited issues raised by Plaintiff Honolulu Federal's Reply Memorandum in connection with the Motion for Remand ("Hon Fed") and to address arguments raised by Fourth Party Plaintiffs' in their Memorandum filed on March 28, 1991[1] indirectly responding to FPDs' Motion to Dismiss.

II. GOOD AUTHORITY EXISTS THAT FOURTH PARTY DEFENDANTS MAY REMOVE UNDER SECTION 1441 (a)(1) AND THE SECTION ALLOWS REMOVAL BY A FEDERAL AGENCY, NOT JUST FEDERAL OFFICER

Three cases raised by FPDs in their Opposition, address the precise issue as to whether an agency of the United States may remove a state action under Section 1441(a)(1).[2] In *IMFC*, the Department of Health and

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[1] FPDs request this court's indulgence in considering its Supplemental Memorandum which is not in strict compliance with Local Rule 220-3. However, all cases discussed herein were previously cited in connection with FPDs' timely filed Memorandum in Opposition to Motion for Remand. Moreover, to the extent FPDs were brought into a lawsuit at this late date after it has been pending for six years, this Court should have the benefit of full briefing by the parties.

[2] *IMFC Professional Services of Florida, Inc. v. Latin American Home Health, Inc.*, 676 F.2d 153 (5th Cir. 1982); *Ewell v. Petro*

(Continued on following page)

Human Services ("HHS") intervened as a party defendant and removed the state complaint to federal court. Plaintiff then voluntarily dismissed HHS and a motion to remand the case back to state court was granted. one of the other defendants filed a third-party complaint against HHS and HHS again removed the action to federal court. the court found that although HHS was a third party defendant, this did not defeat removal under 28 U.S.C. § 1442(a)(1). *Id.* at 156. The court further stated: "the only prerequisite to removal of a civil action under § 1442 is that it be brought against a federal officer *or* agency." *Id.* at 156. (underscoring added)

Furthermore, the Fifth Circuit went so far as to hold that the same section "authorizes removal of the entire case even though only one of its controversies might involve a federal officer or agency." *Id.* at 158.

This same issue was also specifically addressed in *Ewell v. Petro Processors of Louisiana, Inc.*, 655 F. Supp. 933 (M.D. La. 1987) where the Environmental Protection Agency ("EPA") was sued as a primary defendant in state court and thereafter removed the case to federal district court pursuant to 28 U.S.C. §1442(a)(1). The District Court cited to *IMFC* and concluded that the section authorized removal of proceedings commenced in a state court against a federal agency. *Id.* at 935. No federal officers were involved. However, the court found subject

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(Continued from previous page)

Processors of Louisiana, Inc., 655 F. Supp. 933 (M.D. La. 1987); *National Audubon Society v. Department of Water*, 496 F. Supp. 499 (E.D. Ca. 1980). (See page 5, FPD's Memorandum in Opposition to Motion for Remand)

matter jurisdiction over the case pursuant to the EPA's removal under Section 1441(a)(1). *Id.*

A District Court in California also addressed this issue squarely. In *National Audubon Society v. Department of Water*, 496 F. Supp. 499 (E.D. Ca. 1980), the state plaintiffs urged remand using the same arguments advanced by Hon Fed here, that the statute applies only to human beings, federal officers. *Id.* at 504.

The District Court initially found that where removal is predicated on Section 1442, a different standard from that under Section 1441 must be applied, one which would effectuate its purpose of providing a federal forum for the United States government and its officers. *Id.* at 507. The court concluded:

> As the Supreme Court notes, the United States can only act through its officers and employees (i.e. human beings). In like manner its agencies may only act through human beings. Although clearly the historical origin of Section 1442 was the protection of individual officers, its purpose has been broadened by amendment and now may be seen to rest on a "federal interest" (cite omitted) and is an 'incident of federal supremacy.' (cite omitted). Given the values now recognized as the underpinning of Section 1442, and the broad reading the court must give the section, it appears that the word "person" might reasonably be read to encompass the government's agencies. *Id.* at 508.

This court could likewise find that Section 1442 (a)(1) encompasses both federal agencies and officers.[3]

III. CONCLUSION

The standard imposed under Section 1442(a)(1) requires that the courts give effect to federal officers and agencies' rights to have their claims and defenses adjudicated in a federal forum. FPDs believe they are being used as pawns to invoke federal court jurisdiction and forestall the inevitable. The underlying lawsuit in this action has been pending approximately five years. At no time during this period, was any attempt made to join these FPDs as parties.

On the eve of dispositive motions, FPDs are sued based on pleadings which fail to state any claim for relief against these defendants. It is highly unlikely that Fourth Party Plaintiffs will *ever* be able to state a valid cause of action against these defendants or point to a valid basis for subject matter jurisdiction against these defendants. however, this court is the proper forum for such issues to be considered and decided.

WHEREFORE, for all of the foregoing reasons, FPDs respectfully request that the Motion for Remand be denied insofar as it pertains to the Third and Fourth party Complaint.

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[3] As FPD's Opposition Memorandum makes clear, FPDs believe that if they are not dismissed from this lawsuit, then this Court is the proper forum for their claims under Section *1442(a)(1)*.

DATED: April 8, 1991, at Honolulu, Hawaii.

DANIEL BENT
United States Attorney
District of Hawaii

By /s/ Beverly A. Wee
BEVERLY A. WEE
Assistant U.S. Attorney

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and Resolution Trust Corporation

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

HONOLULU FEDERAL SAVINGS AND LOAN ASSOCIATION,	CIVIL NO. 91-00050 DAE
Plaintiff,	SUPPLEMENTAL MEMORANDUM IN
vs.	SUPPORT OF THE
TRITON CONTINENTAL PROPERTIES JOINT VENTURE, TRITON CONTINENTAL PROPERTIES CORPORATION, MICHAEL B. MONTGOMERY, HUGO VON PLATEN-LUDER, ABRAHAM GROSSMAN, RONALD D. McCOMMON,	MOTION OF THE FDIC, OTS, AND RTC TO DISMISS THE FOURTH PARTY COMPLAINT AND IN PARTIAL OPPOSITION TO MOTION TO REMAND

and CALIFORNIA-HAWAIIAN FUND, INC.,

Defendants.

(Filed Jun 21, 1991)

Date: July 1, 1991
Time: 9:45 a.m.
Judge: David A. Ezra

CALIFORNIA-HAWAIIAN FUND, INC., a Hawaii corporation, for itself and as assignee,

Third-Party Plaintiff,

vs.

TRITON CONTINENTAL PROPERTIES CORPORATION, a Hawaii corporation,

Third-Party Defendant,

and

ALVIN K.H. CHEE, JAMES ADRIAN ADAMS, HUGH P. CONSER, CHEE-HIRONAKA, a Hawaii General partnership, SAM S. HIRONAKA, and JOHN DOES 1-10, JANE DOES 1-10, DOE PARTNERSHIPS 1-10, DOE CORPORATIONS 1-10, DOE FINANCIAL INSTITUTIONS 1-10, DOE

ENTITIES 1-10, and DOE GOVERNMENTAL UNITS 1-10,

Additional Third-Party Defendants.

TRITON CONTINENTAL PROPERTIES CORPORATION, ALVIN K.H. CHEE and JAMES ADRIAN ADAMS,

Cross-Claimants,

vs.

MICHAEL B. MONTGOMERY, HUGO VON PLATEN-LUDER and RONALD D. McCOMMON,

Cross-Claim Defendants,

and

SHIRLEY VON PLATEN-LUDER AND ABRAHAM GROSSMAN,

Additional Cross-Claim Defendants.

HUGO VON PLATEN-LUDER,

Fourth-Party Plaintiff,

vs.

FEDERAL DEPOSIT INSURANCE CORPORATION, OFFICE OF THRIFT SUPERVISION, RESOLUTION TRUST CORPORATION, United States Federal Corporations and Agencies, jointly and severally,

Fourth-Party Defendants.

SUPPLEMENTAL MEMORANDUM IN SUPPORT OF THE MOTION OF THE FDIC, OTS, AND RTC TO DISMISS THE FOURTH PARTY COMPLAINT AND IN PARTIAL OPPOSITION TO MOTION TO REMAND

In addition to the arguments made in the Memorandum in Support of the Motion to Dismiss filed on March 22, 1991, the Federal Deposit Insurance Corporation (FDIC), the Office of Thrift Supervision (OTS) and the Resolution Trust Corporation (RTC), collectively referred to as the Federal Defendants, would like to draw the Court's attention to additional relevant matters. In sum, we submit that abundant grounds exist for the dismissal of the Fourth Party Complaint against the Federal Defendants, but, until such Fourth party Complaint is dismissed, the case is properly in Federal District Court, whether or not the initial removal was based on erroneous grounds.

I. The Fourth Party Complaint Should Be Dismissed For Lack Of Jurisdiction Or For Failure To State A Claim Upon Which Relief Can Be Granted.

The FDIC and the RTC are agencies of the United States Government. 12 U.S.C. §§ 1819(b)(1) and 1441a(b)(1)(B). The Office of Thrift Supervision is a subdivision of the United States Department of the Treasury. 12 U.S.C. § 1462a (a). Thus, all the Fourth Party defendants are agencies or subdivisions of the Federal Government. This is important because the Fourth Party Complaint sounds in tort implicating the Federal Tort Claims Act (28 U.S.C. §§ 1346(b) and 2671 et seq.) The Fourth Party Complaint reads in relevant part:

> COMES NOW HUGO VON PLATEN-LUDER, by and through his attorney, Gary Victor Dubin,and hereby incorporates by reference the pleading set forth as Exhibit 1 hereto in a related action, and for causes of action against Fourth-Party Defendants, each and all, above-named, avers that with respect to the allegations so incorporated herein by their negligent and wrongful acts and the negligent and wrongful acts of their officials and employees these Fourth-Party Defendants are responsible to him for the damages claims against Fourth-party Plaintiff in the Cross-Claim filed against him herein, for all or for a part of the damage charged, in an amount to be determined at trial.

Thus, the Fourth-Party Complaint itself, at two places, specifically seeks damages for "negligent and wrongful acts". Moreover, a perusal of Exhibit 1 to the Fourth Party Complaint, which is incorporated in the Fourth Party Complaint by reference, confirms the fact

that the Fourth Party Complaint sounds in tort. To the extent that Exhibit 1 has anything to say about the Federal Defendants,[1] it accuses them of negligent or wrongful acts taken by their employees within the scope of the employees' duties. For example, Paragraph 25 of Exhibit 1 accuses the "federal regulators" of negligent or wrongful supervision of "HONFED BANK". Negligent or wrongful supervision is a claim to be dealt with under the Federal Tort Claims Act, *supra. See United States v. Gaubert* 499 U.S. ___, 113 L.Ed 2d 335, 344; 111 S.Ct. 1267, 1271 (1991). Clearly, plaintiff assumes that the employees who took the action complained of were acting within the scope of their employment, for if they were not acting within the scope of employment, then there would be no basis for suing the Federal employers, as plaintiff has done here.

This Court lacks jurisdiction over the tort claims of the Fourth Party Complaint because the suit is against the wrong defendants and because there is no allegation that plaintiff has satisfied the administrative claim requirements of the Federal Tort Claims Act.

It is axiomatic that the sovereign is immune from suit, save as it consents to be sued. *United States v. Sherwood*, 312, U.S. 584, 586 (1941) (Tucker Act waiver). Any waiver of immunity by the sovereign is to be construed strictly in favor of the sovereign, *Library of Congress v. Shaw*, 478 U.S. 310, 318 (1986); *Safeway Portland Employees' Federal Credit Union v. FDIC*, 506 F.2d 1213, 1215 (9th Cir.

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[1] Exhibit 1 is a Complaint in *another action*, but the Fourth Party Defendants in this case, the Federal Defendants, *are not* defendants or parties to that other action.

1975), and the terms of the statute waiving immunity are conditions precedent to the waiver. The only possible waiver of immunity that could apply to claims for negligent or wrongful acts, made in the Fourth Party Complaint against the Fourth-Party Defendants is the limited waiver found in the Federal Tort Claims Act. *Safeway Portland*, 506 F.2d at 1214-16. By its terms, the FTCA is the exclusive remedy for claims sounding in tort. 28 U.S.C. 2679,[2] Thus, in *Safeway Portland, supra;* 1215-1216, the Ninth Circuit rejected the argument that the FDIC could be sued under its "sue and be sued" statute for deceit even though deceit is explicitly excluded from the FTCA's waiver of immunity. *Accord Gregory v. Mitchell*, 634 F.2d 199, 204 (5th Cir. 1981) (FTCA's exclusivity provision, 28 U.S.C. § 2679, explicitly prevents any tort claim for money damages under the general waiver of immunity in the FDIC's grant of jurisdiction "to sue and be sued" in 12 U.S.C. § 1819 even though the court lacked jurisdiction under the FTCA because plaintiff had failed to comply with the FTCA's procedural requirements).

The Federal Tort Claims Act specifies that claims under the Act must be brought against the United States. 28 U.S.C. §§ 1346(b), 2679. The United States is the only proper defendant to a Federal Tort Claims Act suit. *Allen*

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[2] The authority of any federal agency to sue and be sued in its own name shall not be construed to authorize suits against such federal agency on claims which are cognizable under section 1346(b) of this title [28 U.S.C.], and the remedies provided by this title in such cases shall be exclusive.

28 U.S.C. § 2679.

v. Veterans Administration, 749 F.2d 1386, 1388 (9th Cir. 1984); *Woods v. United States*, 720 F.2d 1 451, 1452 n.1 (9th Cir. 1983); *Safeway Portland*, 506 F.2d at 1215. Hence, the Fourth Party Complaint against FDIC, RTC, and OTS must be dismissed for failure to name the correct defendant.

Beyond the failure to sue the proper party, plaintiff has also failed to allege compliance with the administrative claim requirement to the Federal Tort Claims Act. The Court of Appeals for the Ninth Circuit has ruled that, "The timely filing of an administrative claim is a jurisdictional prerequisite to the bringing of a suit under the FTCA . . . and, as such, should be affirmatively alleged in the Complaint." *Gillespie v. Civiletti* 629 F.2d 637, 640 (1980). Where a tort complaint contains no such allegation, dismissal is appropriate. *Ibid.* Here, the Fourth Party Plaintiff does not mention any administrative claim (or any basis for jurisdiction). Accordingly, the Fourth Party Complaint should be dismissed on this ground as well.

II. Until The Fourth Party Complaint Is Dismissed, This Case Is Properly In the Federal District Court.

The Fourth Party Complaint was filed on January 22, 1991. On January 23, 1991 the case was removed to this Federal District Court under the "Notice Of Removal Of Action Under 28 U.S.C. § 1441(b) (Federal Question). Whatever the merits of the Section 1441(b) removal, and the possibility of removal under 28 U.S.C. § 1442, which are debated at length in earlier briefs, it is clear that Fourth Party Defendants FDIC and the RTC have their own specific removal statutes. *See* 12 U.S.C. § 1819(b)(2)

and 1441a (1). Since this case was removed the day after the Fourth Party Complaint was filed, the case was already in Federal Court by the time counsel for the FDIC and RTC become aware of it. Redundant removals would have been pointless, if not futile. Additional notice of removal could not increase the "degree of removal." Nonetheless, it is clear that at least two of the Fourth Party Defendants have a right to remove this matter. Moreover, the case law developed under the FDIC removal provision (12 U.S.C. 1819(b)(2)) allows removal *by any party* of actions to which the FDIC is a party. *Federal Deposit Insurance Corporation v. Otero*, 598 F.2d 627, 630 (1st Cir. 1979). Thus, the worst which can be said of the January 23, 1991 removal is that it cited the wrong statutory authority for the removal.

The Federal Defendants submit that the removal was proper and that either the whole case should be retained in this Court pending a decisions on dismissal the Fourth Party Complaint or that the Fourth Party Complaint should be severed and retained, while the rest of the case is remanded. In any event, the Fourth Party Complaint should be decided by this Court. In line with our earlier arguments, the Federal Defendants submit that the proper result is dismissal of the Fourth Party Complaint and remand of the balance of the case.

Dated: Jun 21 1991, at Honolulu, Hawaii.

Respectfully Submitted,

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Defendants Federal Deposit Insurance
Corporation, Office of Thrift Supervision
and Resolution Trust Corporation

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

HONOLULU FEDERAL SAVINGS AND LOAN ASSOCIATION, Plaintiff, vs. TRITON CONTINENTAL PROPERTIES JOINT VENTURE,	CIVIL NO. 91-00050 DAE PETITION FOR REMOVAL (Filed Jul 29, 1991)

TRITON CONTINENTAL PROPERTIES CORPORATION, MICHAEL B. MONTGOMERY, HUGO VON PLANTEN-LUDER, ABRAHAM GROSSMAN, RONALD D. McCOMMON, and CALIFORNIA-HAWAIIAN FUND, INC.,

Defendants.

CALIFORNIA-HAWAIIAN FUND, INC., a Hawaii corporation, for itself and as assignee,

Third-Party Plaintiff,

vs.

TRITON CONTINENTAL PROPERTIES CORPORATION, a Hawaii corporation,

Third-Party Defendant,

and

ALVIN K.H. CHEE, JAMES ADRIAN ADAMS, HUGH P. COSNER, CHEE-HIRONKA, a Hawaii General partnership, SAM S. HIRONKA, and JOHN DOES 1-10, JANE DOES 1-10, DOE PARTNERSHIPS 1-10, DOE ENTITIES 1-10, and DOE GOVERNMENTAL UNITS 1-10,

Additional Third-Party Defendants.

TRITON CONTINENTAL PROPERTIES CORPORATION, ALVIN K.H. CHEE and JAMES ADRIAN ADAMS,

Cross-Claimants,

vs.

MICHAEL B. MONTGOMERY, HUGO VON PLATEN-LUDER and RONALD D. McCOMMON,

and

SHIRLEY VON PLATEN-LUDER and ABRAHAM GROSSMAN,

Additional Cross-Claim Defendants.

HUGO VON PLATEN-LUDER,

Fourth-Party Plaintiff,

vs.

FEDERAL DEPOSIT INSURANCE CORPORATION, OFFICE OF THRIFT SUPERVISION, RESOLUTION TRUST CORPORATION, United States

Federal Corporations and Agencies, jointly and severally,

Fourth-Party Defendants.

PETITION FOR REMOVAL

To the Judges of the United States District Court for the District of Hawaii:

The Petition of "Fourth Party Defendant" Federal Deposit Insurance Corporation respectfully shows as follows:

On the 22nd day of January, 1991, an action was commenced against Petitioner in the Circuit Court of the First Circuit of the State of Hawaii, entitled, *Hugo Von Platen Luder, Fourth Party Plaintiff v. Federal Deposit Insurance Corporation, et al,* a part of action No. 86-3865, by service of the Fourth Party Complaint, a copy of which is attached (less exhibits).

The above-described action is a civil action which is properly removable to this Court by the Petitioner, Fourth Party Defendant therein, pursuant to Title 12 United States Code, Section 1819 (b)(2)(B), which allows the Federal Deposit Insurance Corporation to remove to the appropriate United States District Court, "any action suit or proceeding" not specifically excepted in that statute. This action is not so excepted.

Wherefore, the Petitioner prays that the above-entitled action now pending against it in the Circuit Court of

the First Circuit of the State of Hawaii be removed to this Court.

Dated:

Respectfully submitted,

THOMAS A. SCHULZ
Assistant General
Counsel

/s/ Daniel F. Ross
LORETTA R. PITT
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UNITED STATES CONSTITUTION

Article III

Section 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services a Compensation, which shall not be diminished during their Continuance in Office.

Amendment 5

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

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12 USCS § 1441a (1992) United States Code

(l) Power to remove; jurisdiction. (1) In general. Notwithstanding any other provision of law, any civil action, suit, or proceeding to which the corporation is a party shall be deemed to arise under the laws of the United States, and the United States district courts shall have original jurisdiction over such action, suit, or proceeding.

(2) Corporation as party. The Corporation shall be substituted as a party in any civil action, suit, or proceeding to which its predecessor in interest was a party with respect to institutions which are subject to the management agreement dated February 7, 1989, among the Federal Savings and Loan Insurance Corporation, the Federal Home Loan Bank Board and the Federal Deposit Insurance Corporation.

(3) Removal and remand. The Corporation may, without bond or security, remove any such action, suit, or proceeding from a State court to the United States District Court for the District of Columbia, or if the action, suit, or proceeding arises out of the actions of the Corporation with respect to an institution for which a conservator or a receiver has been appointed, the United States district court for the district where the institution's principal business is located. The removal of any action, suit, or proceeding shall be instituted –

(A) not later than 90 days after the date the Corporation is substituted as a party, or

(B) not later than 30 days after the date suit is filed against the Corporation, if such suit is filed after the date

of enactment of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 [enacted Aug. 9, 1989].

The Corporation may appeal any order of remand entered by a United States district court.

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12 USCS § 1819 (1992) United States Code

(b)(2) Federal court jurisdiction. (A) In general. Except as provided in subparagraph (D), all suits of a civil nature at common law or in equity to which the Corporation, in any capacity, is a party shall be deemed to arise under the laws of the United States.

(B) Removal. Except as provided in subparagraph (D), the Corporation may, without bond or security, remove any action, suit, or proceeding from a State court to the appropriate United States district court.

(C) Appeal of remand. The Corporation may appeal any order of remand entered by any United States district court.

(D) State actions. Except as provided in subparagraph (E), any action –

(i) to which the Corporation, in the Corporation's capacity as receiver of a State insured depository institution by the exclusive appointment by State authorities, is a party other than as a plaintiff;

(ii) which involves only the preclosing rights against the State insured depository institution, or obligations owing to, depositors, creditors, or stockholders by the State insured depository institution; and

(iii) in which only the interpretation of the law of such State is necessary,

shall not be deemed to arise under the laws of the United States.

(E) Rule of construction. Subparagraph (D) shall not be construed as limiting the right of the Corporation to invoke the jurisdiction of any United States district court in any action described in such subparagraph if the institution of which the Corporation has been appointed receiver could have invoked the jurisdiction of such court.

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28 USCS § 1291 (1992) United States Code

§ 1291. Final decisions of district courts

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title [28 USCS §§ 1292(c), (d), 1295].

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28 USCS § 1441 (1992) United States Code

(b) Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.

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28 USCS § 1442 (1992) United States Code

§ 1442. Federal officers sued or prosecuted

(a) A civil action or criminal prosecution commenced in a State court against any of the following persons may be removed by them to the district court of the United States for the district and division embracing the place wherein it is pending:

(1) Any officer of the United States or any agency thereof, or person acting under him, for any act under color of such office or on account of any right, title or authority claimed under any Act of Congress for the apprehension or punishment of criminals or the collection of the revenue.

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28 USCS § 1447 (1992) United States Code

(c) A motion to remand the case on the basis of any defect in removal procedure must be made within 30 days after the filing of the notice of removal under section 1446(a) [28 USCS § 1446(a)]. If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded. An order remanding the case may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal. A certified copy of the order of remand shall be mailed by the clerk to the clerk of the State court. The State court may thereupon proceed with such case.

(d) An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise, except that an order remanding a case to the State court from which it was removed pursuant to section 1443, of this title [28 USCS § 1443] shall be reviewable by appeal or otherwise.

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UNITED STATES DISTRICT COURT (HAWAII)

Rule 205-1.

Assignment of Civil Cases.

Cases will be assigned as determined by the Court.

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UNITED STATES DISTRICT COURT (HAWAII)

Rule 206.1.

Assignment of Similar Cases.

Whenever it shall appear that civil actions or proceedings involve the same or substantially identical transactions, happenings or events, or the same or substantially the same parties or property or subject matter, or the same or substantially identical questions of law, or for any other reason said cases could be more expeditiously handled if they were all heard by the same judge, then the Chief Judge or any other judge appointed by the Chief Judge in charge of the assignment of cases may assign such cases to the same judge. Each party appearing in any such action may also request by appropriate motion that said cases be assigned or reassigned to the same judge.

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HAWAII REVISED STATUTES

§ 663.17. Third-party practice; enforcement of right to contribution.

(a) A pleader may, as provided by the rules of court, bring in as a third-party defendant a person not a party to the action who is or may be liable to the pleader or to the person claiming against the pleader, for all or part of the claim asserted against the pleader in the action, whether or not liability for the claim is admitted by the pleader. A third-party defendant is bound by the adjudication of the third-party plaintiff's liability to the plaintiff as well as of the third party defendant's own liability to the plaintiff or to the third-party plaintiff.